

THE CANADIAN ANTI-DOPING PROGRAM AND THE *CHARTER OF RIGHTS  
AND FREEDOMS*

by

Kate Scallion

Submitted in partial fulfilment of the requirements  
for the degree of Master of Laws

at

Dalhousie University  
Halifax, Nova Scotia  
November 2019

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# Abstract

This thesis examines the relationship between the Canadian Anti-Doping Program (CADP) and the *Charter of Rights and Freedoms*. First, the CADP is explored in depth, including the origins of anti-doping in Canada generally, how Canada's anti-doping regime aligns with international anti-doping regimes, and how the CADP functions in practice. Next, whether or not the *Charter* applies to the CADP is analyzed, looking at whether the administrator of the CADP, the Canadian Centre for Ethics in Sport (CCES), meets the criteria of a "government actor," as well as determining if the CADP itself would be considered a government action and thus attract *Charter* scrutiny. Finally, the elements of the CADP that potentially engage *Charter* rights are surveyed; this includes a discussion of which rights are stake and whether or not any potential infringements of *Charter* rights can be demonstrably justified under s 1 of the *Charter*.

# List of Abbreviations Used

AAP	Athlete Assistance Program
ABP	Athlete Biological Passport
ADRV	anti-doping rule violation
CADO	Canadian Anti-Doping Organization
CADP	Canadian Anti-Doping Program
CAS	Court of Arbitration for Sport
CCDS	Canadian Centre for Drug-Free Sport
CCES	Canadian Centre for Ethics in Sport
COA	Canadian Olympic Association
CPADS	Canadian Policy Against Doping in Sport
CSP	Canadian Sport Policy
CTAF	Canadian Track and Field Association
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FINA	Fédération Internationale de Natation
FNASS	Fédération Nationale des Associations et Syndicats de Sportifs
IAAF	International Association of Athletics Federations
ICAS	International Council of Arbitration for Sport
IOC	International Olympic Committee
LAC	Library and Archives Canada
NADO	national anti-doping organization
NSO	national sport organization
OIC	Order in Council
OSA	Ontario Soccer Association
OTP	Own the Podium
PED	performance-enhancing drug(s)
PSO	provincial sport organization
RTP	registered test pool
SCSES	Sport Canada Strategy on Ethical Sport
SDRCC	Sport Dispute Resolution Centre of Canada
SFAF	Sport Funding and Accountability Framework
SMCC	Sport Medicine Council of Canada
SSP	Sport Support Program
TUE	therapeutic use exemption
UCI	Union Cycliste Internationale
UNESCO	United Nations Educational, Scientific and Cultural Organization
VANOC	Vancouver Organizing Committee
WADA	World Anti-Doping Agency
WADC	World Anti-Doping Code



# Acknowledgements

A thesis, like any large undertaking, is never a solo endeavour. There have been many, many, many people who have helped me in Halifax and beyond.

Thank you to everyone who helped me locate a copy of *In the Matter of Glenn Dodds and the Sport Medicine Council of Canada*, including Mark Lewis, Marlyn McCann, Marie-Claude Asselin at the SDRCC, as well as the colleagues these people contacted at other universities, institutions, and archives. The decision does not take up as much space as the effort put into finding it warrants, but having a copy *did* make a difference to the quality of my thesis. Thank you also to John Barnes, who in responding to my request about a copy of the *Dodds* decision, pointed me to some very useful recent resources.

Thank you to Paul Melia and Jeremy Luke at the CCES for answering my many queries over the past several months and providing me with important information and documents about the CCES.

A huge thank you to my supervisor, Professor Jocelyn Downie, and second reader, Professor Sheila Wildeman, for their endless patience, thoughtful feedback, and insightful commentary as I muddled my way through researching, writing, and countless revisions of this (at times seemingly endless) thesis. They pushed me to my intellectual limits as I attempted to respond to their queries and concerns and make my thesis worthy of their approval. My brain is full. Thank you is not—and will never be—enough.

And last, but by no means least, thank you my nearest and dearest (Arran, Mum, my ski community, Shirley, Elsie, and Gerry to name a few), who not only kept me fed, watered, and exercised, but also kept me both grounded and afloat—literally and figuratively. I cannot (and do not want to) fathom how much more difficult this would have been without your support.

# Chapter 1: Introduction

Canadians have a history of being both the cheater and the cheated in sports. Ben Johnson went from being the world's fastest man to the world's biggest cheater shortly after he won the 100 metres at the 1988 Summer Olympics in Seoul. The glory of his victory quickly changed to shame when news of his positive drug test emerged. The fallout from the 1988 Olympics demonstrated how doping was rampant within Canadian sports—a fact documented by the *Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance*.<sup>1</sup> While doping in Canadian sports certainly has not been eradicated,<sup>2</sup> there have been multiple Olympics in the past two decades where Canadian athletes have had their finish position upgraded due to dopers getting caught. Perhaps the most notable of these is Beckie Scott, whose bronze medal in cross-country skiing from the 2002 Salt Lake City Olympics was eventually upgraded to gold after the two skiers in front of her were subsequently found to have doped.<sup>3</sup> But Beckie Scott is not the only Canadian athlete affected. Re-testing of samples from the 2008 and 2012 Olympics have also led to Canadian athletes like Dylan Armstrong and Christine Girard receiving their rightful medals years after they earned them.<sup>4</sup>

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<sup>1</sup> Charles Dubin, *Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance*, (final report of commission), Commissioner Charles Dubin (Ottawa: Minister of Supply and Services Canada, 1990) at xvii, 90 [Dubin Commission].

<sup>2</sup> The Canadian Centre for Ethics in Sport performed 3,547 drug tests under the CADP between April 1, 2017 and March 31, 2018. Of those tests, 31 resulted in anti-doping rule violations. The sport with the most anti-doping rule violations was powerlifting, with 11; a total of 122 drug tests were done in powerlifting. See Canadian Centre for Ethics in Sport, *Annual Report 2017-2018* (Ottawa: CCES, 2018) at 17-18.

<sup>3</sup> Beckie Scott is a vocal proponent of anti-doping. She competed on Canada's national cross-country ski team from 1994-2006, including at the 1998, 2002, and 2006 Olympics. She has served on WADA's athlete committee and executive committee. She resigned from the WADA's compliance and review committee in 2018 following the reinstatement of Russia's anti-doping agency. See "Beckie Scott" (last visited 14 September 2019), online: *Olympic.ca*, <[olympic.ca/team-canada/beckie-scott/](http://olympic.ca/team-canada/beckie-scott/)>.

<sup>4</sup> Paula Nichols & Chloe Morrison, "History of Team Canada Olympic Medal Upgrades" (1 December 2018), online: *Olympic.ca*, <[olympic.ca/2018/12/01/history-of-team-canada-olympic-medal-upgrades/](http://olympic.ca/2018/12/01/history-of-team-canada-olympic-medal-upgrades/)>.

Anti-doping in sports serves many functions. It deters prospective cheaters. It punishes dopers. And it protects clean athletes. Anti-doping efforts are now large scale and well-coordinated across sports, and across national and international borders. Provincial organizations, like Bicycle Nova Scotia, follow the same anti-doping rules and procedures as international federations like the International Cycling Union. Because its breadth is so large and its scope is so far-reaching, anti-doping enforcement affects athletes at nearly every level of sport. This includes recreational athletes who buy a membership in provincial organizations like Bicycle Nova Scotia so they can compete in mountain bike races on the weekend. It includes the elite athletes who represent Canada on the international stage. It includes university athletes and youth athletes, and nearly everyone in between who joins a sport organization that adheres to the Canadian anti-doping program (CADP).<sup>5</sup>

The Canadian Anti-Doping Program is one facet of Canada's nation-wide approach to anti-doping.<sup>6</sup> It potentially affects hundreds of thousands of Canadian athletes.<sup>7</sup> While few people would be surprised to learn that an Olympian needs to comply with anti-doping measures, they may be surprised to learn that their neighbour

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<sup>5</sup> Canadian Centre for Ethics in Sport, *2015 Canadian Anti-Doping Program* (1 September 2017), online: *CCES*, <[cces.ca/sites/default/files/content/docs/pdf/cces-policy-cadp-2015-v2-e.pdf](http://cces.ca/sites/default/files/content/docs/pdf/cces-policy-cadp-2015-v2-e.pdf)> [CADP].

<sup>6</sup> The CADP is recognized in the Federal-Provincial/Territorial *Canadian Policy Against Doping in Sport—2011*, and is one of the ways Canada meets its obligations under the UNESCO Convention Against Doping in Sport, under which Canada is committed to implementing and following the World Anti-Doping Code. See Government of Canada, *Canadian Policy Against Doping in Sport—2011* (11 February 2011), online: *Canada*, <[www.canada.ca/en/canadian-heritage/services/sport-policies-acts-regulations/policy-against-doping-sport.html](http://www.canada.ca/en/canadian-heritage/services/sport-policies-acts-regulations/policy-against-doping-sport.html)> [CPADS-2011]; UNESCO, *International Convention Against Doping in Sport* 2005, 19 October 2005, 2419 UNTS 201 (entered into force 1 February 2007) [UNESCO Convention].

<sup>7</sup> E.g., The CCES performed drug testing for more than 80 national sport organizations under the CADP, as well as testing university and college athletes. According to Statistics Canada, more than 8 million Canadians participated in sports on a regular basis in 2016. See CCES, Annual Report, *supra* note 2 at 17; Statistics Canada, *Regular Participation in Sports by Sex and Other Demographic Characteristics* (Ottawa: Statistics Canada, 2017) at table 13-10-0603-01, online: *Statistics Canada*, <[www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1310060201](http://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1310060201)>.

who likes to run marathons is also subject to the CADP. While the rules do not apply completely uniformly to Olympians and university athletes,<sup>8</sup> the Prohibited List<sup>9</sup> and testing methods are the same—as are the sanctions. This may raise questions about elements of the CADP that could infringe athletes’ *Charter* rights.

The overarching question that this research seeks to answer is whether or not the *Charter of Rights and Freedoms* applies to the CADP: the anti-doping rules that apply to athletes in Canada.<sup>10</sup> The CADP is not a piece of legislation. It is self-described as a “collective agreement,”<sup>11</sup> but it is not a collective agreement as the term is typically used and understood.<sup>12</sup> The CADP functions as a set of regulations that individuals and sport organizations must follow. It is officially authored by the Canadian Centre for Ethics in Sport (CCES), but in practice, adopts large portions of the World Anti-Doping Code (WADC), a requirement imposed on signatories of the WADC.<sup>13</sup> Further, the CADP is not administered by an official government agency, but is instead administered by the independent non-profit CCES. On those facts alone, there is no *prima facie* application of the *Charter* to the CADP because there is no obvious government actor or government

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<sup>8</sup> E.g., Student-athletes are not required to obtain therapeutic use exemptions. See CADP, *supra* note 5 at 4.5.

<sup>9</sup> World Anti-Doping Agency, *The World Anti-Doping Code International Standard: Prohibited List* (Montreal: WADA, January 2019), online: WADA, <[www.wada-ama.org/sites/default/files/wada\\_2019\\_english\\_prohibited\\_list.pdf](http://www.wada-ama.org/sites/default/files/wada_2019_english_prohibited_list.pdf)>.

<sup>10</sup> *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

<sup>11</sup> CADP, *supra* note 5 at 2.1.

<sup>12</sup> A collective agreement is between an employer and a trade union, and it sets out the terms and conditions of employment. See Steve Coughlan, *Canadian Law Dictionary*, 7th ed (Hauppauge, New York: Barron’s, 2013) *sub veto* “collective bargaining agreement”; Katherine Barber, ed, *Canadian Oxford Dictionary*, 2nd ed (Don Mills: Oxford UP, 2004), *sub veto* “collective agreement.”

<sup>13</sup> State governments, like Canada, do not sign on to the WADC, but rather national anti-doping agencies (NADOs) do. See World Anti-Doping Agency, “Code Signatories,” (last visited 17 September 2019), online: WADA, <[www.wada-ama.org/en/what-we-do/the-code/code-signatories#GovernmentFundedOrganizations](http://www.wada-ama.org/en/what-we-do/the-code/code-signatories#GovernmentFundedOrganizations)>.

action.<sup>14</sup> But the answer to the question of whether or not the *Charter* applies to the CADP is not quite so clear.

Chapter 1 outlines what the CADP is and how it works. This section is more descriptive than analytical, but it sets the stage for subsequent sections and helps to show what rights and interests are at stake when it comes to anti-doping. In this section, I cover the history of anti-doping in Canada with respect to both national and international actions, how international bodies and policies have affected anti-doping in Canada, and the objectives behind anti-doping (including the public values purportedly advanced through anti-doping and the use of sport as a policy tool). Chapter 1 also details how the CADP operates in practice, including who writes the CADP, who adopts the CADP, who is bound by it and how, who administers the CADP, and the key provisions, legal standards, and procedures of the CADP.

Chapter 2 analyzes whether or not the *Charter* applies to the CADP using analytical frameworks developed by the Supreme Court of Canada in s 32 case law, including *McKinney* and *Eldridge*, but also drawing on other cases such as *Douglas College*, *Pridgen*, and *Sagen*.<sup>15</sup> This chapter begins by first explaining why I take a constitutional law approach instead of using administrative law. It then reviews the existing case law and arbitral decisions that discuss whether or not anti-doping attracts

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<sup>14</sup> *Charter*, *supra* note 10 at s 32(1): “a. This *Charter* applies: to the Parliament and the government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and the Northwest Territories; and b. to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.”

<sup>15</sup> *McKinney v University of Guelph*, [1990] 3 SCR 229, 2 OR (3d) 319 [*McKinney*]; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge*]; *Douglas/Kwantlen Faculty Assn v Douglas College*, [1990] 3 SCR 570, 118 NR 340; *Pridgen v University of Calgary*, 2012 ABCA 139, 350 DLR (4th) 1 [*Pridgen*]; *Sagen v Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, 2009 BCCA 522, 98 BCLR (4th) 141 (CanLII) *aff’d* in part 2009 BCSC 942, 98 BCLR (4th) 109 (CanLII) [*Sagen*].

*Charter* protection. Next, I review the case law on determining whether or not something is a government actor and apply the *McKinney* framework to the CCES. The last part of this chapter looks at the case law for determining whether or not something constitutes a government action (despite the actor not being government) and thus earns *Charter* protection. I apply the *Eldridge* analysis to the CADP itself in an attempt to find a nexus between government and the action of anti-doping.

Chapter 3 assumes the *Charter* applies to the CADP for the sake of argument. This chapter delves into the specific provisions of the CADP that may infringe the *Charter* and analyzes whether or not these infringements are demonstrably justifiable. The rights at stake include: s 2(d), freedom of association; s 7, life, liberty, and security of the person; s 8, protection against unreasonable search and seizure; s 11(d), the presumption of innocence; and s 15, equality rights. Elements of the CADP that may infringe these rights are prohibited association and ineligibility, the Whereabouts Rule, the Athlete Biological Passport, public disclosure of anti-doping rule violations, strict liability, the Prohibited List, and therapeutic use exemptions.

Before jumping feet first into the CADP, I provide a brief literature review on anti-doping and outline my methodologies to situate my work relative to what has already been done with respect to anti-doping and constitutional rights. These two sections show whose research has provided the foundation for my research, and articulate the methods I have used to draw my conclusions.

## Literature Review

Although I focus on anti-doping, I attempt to situate anti-doping and sports law within the context of public law and constitutional law.<sup>16</sup> My work is not an attempt to validate sports law, but rather to ensure that *Charter* protection is available in an environment (like sport) that exists in both public and private domains—public, not only because of its prominent role in society, but because of the amount of government money that goes toward supporting sport and athletes; private because sport is primarily regulated by private organizations and federations, which set their own rules of play and conduct. The public-private divide in sport is well illustrated by *Sagen*, which demonstrates how government can be actively involved in sport through hosting major events like the Olympics, and showcases the primacy of international federations (like the International Olympic Committee) in setting the rules of play and selecting events without concerns for issues like gender equity.<sup>17</sup> One of my underlying assumptions is that sport is valuable to society,<sup>18</sup> but I also believe that its value is diminished if it does not protect athletes' rights. My goal is to place this thesis among other research that argues elements of sport

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<sup>16</sup> Whether or not sports law, also referred to as *lex sportiva* is an actual legal domain is sometimes questioned. See e.g., Timothy Davis, “What is Sports Law?” in Robert Siekmann & Janwillem Soek, eds, *Lex Sportiva: What is Sports Law* (The Hague: Springer, 2012) 359.

<sup>17</sup> *Sagen*, *supra* note 15, showed how the *Charter* has some application to VANOC, but the *Charter* protection did not extend to selecting events for Olympic inclusion; only the IOC had jurisdiction to decide which events would be contended at the 2010 Olympic Games. This meant that women ski-jumpers could legally be excluded from competing, despite the fact that disallowing their competition clearly discriminates on the basis of sex.

<sup>18</sup> This assumption is not unfounded in light of decisions such as *West Toronto United Football Club v Ontario Soccer Association*, 2014 ONSC 5881 at paras 23-24, 327 OAC 29, where Nordheimer J decided the Ontario Superior Court had jurisdiction to review a decision of the Ontario Soccer Association (OSA) to award victory to a team that had not, in fact, won the game. In coming to this conclusion, Nordheimer reflected on the public impact of the OSA to decide that its activities fell within the purview of public law. This case, admittedly, is not a good precedent to follow as it was expressly rejected by the Supreme Court in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26, [2018] 1 SCR 750, which is discussed briefly in Chapter 3.2.

come under the public law umbrella and as such, ought to respect constitutional and *Charter* rights.

There is no dearth of anti-doping literature, including anti-doping literature in the context of human or athletes' rights, nor is there a lack of commentary on the *Charter*. Where there is a gap, however, is commentary on how anti-doping and human rights or anti-doping and the *Charter* may interplay in the Canadian context. Keyword searches on CanLII, WestLawNext Canada, and NovaNet using a combination of "anti-doping and human rights," "anti-doping and Charter" or "anti-doping and constitution" bring back hundreds of relevant results for secondary sources (and a small number of cases). Anti-doping is a topic that has been discussed and debated broadly around the world, even if there is limited jurisprudence to draw on.

Anti-doping commentary crosses several disciplines. In addition to legal scholars, anti-doping researchers include sociologists and historians; articles and books on anti-doping come from journals in fields such as policy, politics, sociology, medicine, philosophy, bioethics, health, history, and ethics, in addition to legal journals. The variety of sources, unsurprisingly, employ a variety of methods, which reflects the array of journals and fields from which I'm drawing, especially for establishing the history and purpose of anti-doping in Canada, as well as determining which sections of the *Charter* the CADP may infringe.

Many articles, but particularly those related to anti-doping and human rights, are from international sources. This may be connected to jurisprudence from the European Court of Human Rights, which has ruled on how anti-doping can infringe human rights



protected by the *European Convention on Human Rights*.<sup>19</sup> There are very few peer-reviewed resources looking specifically at the CADP (rather than mentioning it more in passing), though there is some grey literature discussing the case of a Canadian athlete who has been very vocal and public in his criticism of how anti-doping is administered generally.<sup>20</sup> There are significantly more resources available criticizing the World Anti-Doping Agency (WADA) and the WADC,<sup>21</sup> which have been helpful in identifying which provisions have been challenged in other jurisdictions, which in turn has helped me determine whether or not those criticisms apply to the CADP.<sup>22</sup> Some scholars rightfully point out that there are few justifications for how anti-doping is administered other than the blanket “cheating is bad and sports are good” assumption.<sup>23</sup> WADA defends the “Spirit of Sport” as a foundational principle behind the WADC, but that concept has been criticized as being too vague to uphold every element of anti-doping.<sup>24</sup>

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<sup>19</sup> E.g., The European Court of Human Rights (ECtHR) has found that the Whereabouts Rule does not breach the *European Convention on Human Rights*. See ECtHR, press release, ECHR018 (2017), “Doping Control: Whereabouts Requirement Does Not Breach Convention” (18 January 2018). See also *Fédération Nationale des Syndicats Sportifs (FNASS) and Others v France* (application no 48151/11 & 77769/13) [2018], ECLI:CE:ECHR:2018:0118JUD004815111, online: ECtHR, <hudoc.echr.coe.int/eng?i=001-180442>.

<sup>20</sup> See e.g., Rick Westhead, “Drug Testing: Wheelchair Athlete Jeff Adams Fights for his Reputation” (17 July 2012), *The Star*, online: *TheStar.com*, <[www.thestar.com/sports/olympics/2012/07/17/drug\\_testing\\_wheelchair\\_athlete\\_jeff\\_adams\\_fights\\_for\\_his\\_reputation.html](http://www.thestar.com/sports/olympics/2012/07/17/drug_testing_wheelchair_athlete_jeff_adams_fights_for_his_reputation.html)>.

<sup>21</sup> E.g., Ivan Waddington & Verner Møller, “WADA at Twenty: Old Problems and Old Thinking?” (2019) 11:2 *Intl J Sport Policy & Politics* 219; Verner Møller & Paul Dimeo, “Anti-Doping—The End of Sport” (2014) 6:2 *Intl J Sport Policy & Politics* 259.

<sup>22</sup> E.g., Stefan Feidler, “Fundamental rights of International Athletes in the Court of Arbitration for Sports [*sic*] Viewed through the Eyes of the US Constitution in Cases Involving Anti-Doping Violations” (2013) 3 *Resolved: J Alternative Dispute Resolution* 9. Unlike the *Charter*, the U.S. Constitution protects personal property and so anti-doping arguably violates the US Constitution if it results in loss of income. While criticisms like this were not useful for identifying how *Charter* rights may be infringed, broader criticisms of the WADC with respect to human rights (such as privacy interests that are infringed by the Whereabouts Rule, or the proportionality of sanctions) helped inform how the CADP potentially infringes the *Charter*. E.g., Jan Exner, “Anti-Doping and Athletes’ Rights under EU Law: Four-Year Period of Ineligibility as Disproportionate Sanction?” (2018) 17 *Intl Sports LJ* 128.

<sup>23</sup> See e.g., Kevin Ryan, “Doping and Anti-Doping: the Excesses of Enterprise and the Tyranny of Transparency” (2015) 7:4 *Intl J Sport Policy & Politics* 637.

<sup>24</sup> Olivier de Hon, “The Redundancy of the Concept of ‘Spirit of Sport’ in Discussions on the Prohibited List of Doping Substances” (2017) 9:4 *Intl J Sport Policy & Politics* 667. But see MJ McNamee, “The

Following up on these criticisms helped me maintain a critical eye on anti-doping and question my own motivation in pursuing this research—is it to validate anti-doping and the CADP, is it to point to weaknesses that could improve anti-doping and the CADP if they are addressed, or is it something else?

Prominent resources that I rely on include the Dubin Commission, *Sport Policy in Canada* (edited by Lucie Thibault and Jean Harvey), reports from the Privacy Commissioner of Canada, Library of Parliament, and policy statements or program descriptions from Sport Canada.<sup>25</sup> Several of my sources predate both the original and current WADC and CADP, but I still found them to be useful because of the context and background information they provide—particularly for developing my argument that anti-doping is a government action. Other sources, both recent and older, were less useful than expected because they discuss specific problems with draft versions or out-of-date versions of the WADC, or because they focus on anti-doping issues in a jurisdiction that has integrated the WADC into their national anti-doping program differently than Canada has.<sup>26</sup>

The *Dubin Commission*, established in the wake of Ben Johnson’s positive test at the 1988 Olympics, is a rich resource because it details the history of doping control prior

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Spirit of Sport and Anti-Doping Policy: an Ideal Worth Fighting For” (21 February 2013), online: *WADA*, <[www.wada-ama.org/en/media/news/2013-02/the-spirit-of-sport-and-anti-doping-policy-an-ideal-worth-fighting-for](http://www.wada-ama.org/en/media/news/2013-02/the-spirit-of-sport-and-anti-doping-policy-an-ideal-worth-fighting-for)>.

<sup>25</sup> Dubin Commission, *supra* note 1, Lucie Thibault & Jean Harvey, eds, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013); Privacy Commissioner of Canada, *Drug Testing and Privacy* (Ottawa: Minister of Supply and Services, 1990); Nancy Holmes & Karine Richer, *Drug Testing in the Workplace* (Ottawa: Library of Parliament, 2008).

<sup>26</sup> E.g., Janwillem Soek, *The Strict Liability Principle and the Human Rights of Athletes in Doping Cases* (The Hague: Asser Press, 2006); Barrie Houlihan, “Civil Rights, Doping Control and the World Anti-Doping Code” (2004) 7:3 *Sport in Society*, 420; Ulrich Haas & Deborah Healey, eds, *Doping in Sport and the Law* (Oxford: Hart Publishing, 2015). This latter book had a chapter on the applicability of administrative law to anti-doping; however, it was not applicable to the CADP because the chapter focused on Australia, where anti-doping is legislated.

to 1988, both within Canada and internationally; it discusses sport as an instrument of policy; and the penultimate section focuses on the rights and ethical considerations of anti-doping.<sup>27</sup> Although some elements of this report are out of date (it was published in 1990 and thus predates both the current WADC and CADP by nearly three decades), it is a foundational document in Canada's anti-doping regime and also clearly demonstrates that the federal government had an active role and took an interest in anti-doping initiatives in Canada. This report was the starting point for much of my historical, theoretical, and even doctrinal research. Further, there is not much critical commentary on the *Dubin Commission*, but it is cited in many articles on anti-doping in Canada, and, when it was released, it was recognized as “the single most important published source” in Canadian sports law.<sup>28</sup>

Other Canadian scholars who have discussed anti-doping in depth include John Barnes, Rob Beamish, Ian Ritchie, and Greg Jackson. These scholars have been useful to help set the historical context and provide some arguments for *Charter* application, but there is very little recent Canadian scholarship on anti-doping, particularly with respect to anti-doping and the *Charter*. The most recent in-depth analysis of the Canadian sport system and government policies and involvement in it is *Sport Policy in Canada*, edited by Thibault and Harvey. This book is “the most recent and most comprehensive examination of sport policy in Canada published to date.”<sup>29</sup> Several chapters in the book helped illuminate issues in the Canadian sport system with respect to anti-doping, though,

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<sup>27</sup> Dubin Commission, *supra* note 1.

<sup>28</sup> John Barnes, 1991, “Recent Developments in Canadian Sports Law” (1991) 23:3 Ottawa L Rev 623 at 627. See also Caitlin Jenkins, *Establishing a World Anti-Doping Code: WADA's Impact on the Development of an International Strategy for Anti-Doping in Sport* (Masters Thesis, University of Windsor Faculty of Human Kinetics, 2006) [unpublished] at 72.

<sup>29</sup> Lucie Thibault & Jean Harvey, “Introduction” in Lucie Thibault & Jean Harvey, eds, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013) 1 at 5.

there is only one chapter dedicated to anti-doping and it does not directly answer the question of *Charter* application to the CADP.<sup>30</sup>

Currently, it seems the most active anti-doping scholars are from Europe, the United Kingdom, and Australia.<sup>31</sup> Despite several of my sources not having much direct application to whether or not the *Charter* applies to the CADP, these resources have been useful in terms of demonstrating how other jurisdictions have grappled with the intersection between anti-doping and constitutional or human rights.

Although not precisely done as a part of my literature review, I also looked at a lot of original sources and documents with a view to finding information rather than tracing the evolution of anti-doping from its origins to today (which is how I used, for example, some historical resources). This research was essential to my overall work because it helps to demonstrate how anti-doping works in practice. While I did not generate any empirical data of my own, I was able to rely on sources such as the annual reports produced by the CCES to find data on how many athletes were tested each year, in what sports, how many resulted in positive tests, etc. This information shows the effects of anti-doping in action.

The CADP itself is an important source for this kind of pure information because it is the document that articulates the standards, practices, and procedures used in anti-doping. The CADP outlines its relationship to the Canadian sport community and

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<sup>30</sup> Rob Beamish, "Olympic Ideals Versus the Performance Imperative: The History of Canada's Anti-Doping Policies" in Lucie Thibault & Jean Harvey, eds, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013) 217.

<sup>31</sup> E.g., Janwillem Soek is from the Netherlands; Verner Møller is from Denmark, Paul Dimeo is from Scotland; Deborah Healey is from Australia.

explains how it fits into the Canadian sport system as well as how it relates to anti-doping at the international level.

Constituting documents (including the original articles of incorporation, the 1992 bylaws, and the 2014 bylaws) and audited financial reports for the CCES have helped provide information such as the amount of money the federal government contributes to CCES, and whether or not the federal government has any role in the governance or management of CCES.<sup>32</sup> Likewise, information from the federal government, such as the Public Accounts and Budget 2019 documents, were also useful in terms of determining how much money the federal government invests in the Canadian sport system. I also used sources such as financial statements for provincial and national sport organizations to attempt to find out how much these bodies might spend on anti-doping annually; these documents were found by specific Google searches if the financial statements were not easy to find on the organization's website.<sup>33</sup>

Sport Canada information also was a key part of my research—for example, information on the various Sport Canada policies and programs analyzed in Chapter 3. This information was generally gathered online from the Department of Canadian Heritage on the various websites where those programs and policies are hosted.<sup>34</sup>

Documents from the World Anti-Doping Agency, such as the International Standards and the Prohibited List helped are also important resources as they not only inform elements of the CADP, but also provide some of the answers as to why certain

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<sup>32</sup> These documents came from the CCES directly, though I could have purchased the bylaws online through the Canadian Corporation Database.

<sup>33</sup> E.g., I Googled “audited financial statement” for Athletics Canada, Athletics BC, Alpine Canada, and other sport organizations, chosen at random but looking at both federal and provincial bodies.

<sup>34</sup> E.g., The information on the Sport Support Program was found on the Canadian Heritage website.

methods or standards are used in anti-doping, which can help articulate whether or not they are demonstrably justifiable.

Research from these original documents not only demonstrates the practical nature and costs of anti-doping, but it shows how many people are affected by anti-doping and how government support is needed to support anti-doping efforts.

## Methodology

This thesis relies primarily on two methodologies: historical and doctrinal. Secondary research on both historical sources and case law produced dozens of articles and other resources from a variety of fields, including sociology and policy. Interdisciplinary methodologies have bearing on my research due to the variety of methods used by the sources on which I rely (reflecting the diversity of fields from which I have found resources, including historical and sociological).

The vast majority of my research took place between November 2018 and June 2019. The main keywords and combinations of keywords used in all my electronic searches were “doping,” “anti-doping,” “drug use in sport,” “doping & Charter,” and “doping & human rights.” I also searched the names of specific policies (e.g., “Drug Use and Doping in Sport,” “Canadian Anti-Doping Program,” “World Anti-Doping Code”) and agencies (“Canadian Centre for Ethics in Sport,” “CCES,” “Sport Dispute Resolution Centre of Canada,” “SDRCC,” “World Anti-Doping Agency,” “WADA”) to find cases, commentary, or other resources where specific policies may have been discussed or critically analyzed. Other searches focused on terms, like “comfortable satisfaction” and “quasi-criminal” to find discussion on how scholars have grappled with these terms with respect to anti-doping.

Throughout my research, I also researched *Charter* application more generally, looking at cases like *McKinney*, *Eldridge*, and *Pridgen*, as well as commentary on these cases, and if and how others (including courts) have grappled with how the *Charter* applies to non-government actors performing actions that are arguably government actions. This also entailed researching administrative law cases like *Air Canada* and *West Toronto FC* to look at the reasoning behind decisions of when public law applies to voluntary or private sport organizations.<sup>35</sup>

### Historical

I rely on historical methodology primarily to demonstrate the development of anti-doping policies and programs in Canada, and how Canada's historic anti-doping efforts have contributed to today's anti-doping program both domestically and abroad. One of my aims in this historical research was to trace a continuous path of government action in anti-doping to see if I could find evidence to support a s 32 argument that the *Charter* applies to the CADP.

Historical research also helps ground some of the justifications behind anti-doping. The two primary stated objectives behind anti-doping, protecting the spirit of sport and protecting the health of athletes, have remained consistent throughout various anti-doping policies both nationally and internationally; historical research has helped to contextualize where and why these objectives originated—and why they persist as the primary objectives of anti-doping.

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<sup>35</sup> *Air Canada v Toronto Port Authority*, 2011 FCA 347, [2013] 3 FCR 605; *West Toronto FC*, *supra* note 18.

My primary historical sources include major government reports, like the report from the Dubin Commission, but I also rely on primary sources like Canada's first anti-doping policies from 1983 and 1985, Hansard transcripts, reports from the federal Privacy Commissioner, Library of Parliament, and Sport Canada reports.

Historical sources were found by seeking the original documents mentioned in secondary resources. While the Dubin Commission is a seminal report on doping in sports, other sources like the Privacy Commissioner's reports on drug testing were mentioned in secondary sources I found through doing keyword searches on the Dalhousie NovaNet catalogue, CanLII, and WestLawNext Canada. Most primary sources were available online through the Dalhousie NovaNet catalogue or the Government of Canada website.

Hansard transcripts were found by doing keyword searches (using terms like "anti-doping," "doping," "drug use in sport," "Fair Play Commission," "Canadian Centre for Drug-Free Sport," and "UNESCO Convention Against Doping in Sport" in the *Canadian Parliamentary Historical Resources* portal).

I also contacted Library and Archives Canada (LAC) for research assistance as I tried unsuccessfully to find copies of press releases, speeches, or other official government statements from the release of the 1983 and 1985 federal anti-doping policies. While the LAC was also unable to find official government statements on the release of anti-doping policies, they were able to point me to other resources (like Hansard debates that I had not previously found).

Historical research has helped ground this thesis in the entire context of anti-doping efforts within Canada and internationally. As will be discussed in subsequent



chapters, Canada prides itself on taking a leadership position on anti-doping in the global context—a stance that is borne out in this historical research and which contributes to my argument that anti-doping can be considered a government action for the purposes of *Charter* application.

## Doctrinal

My doctrinal research focuses mainly on anti-doping cases as well as leading constitutional law cases. I tried to narrow my constitutional law cases, in particular those on *Charter* application and *Charter* violations, to the leading cases decided by the Supreme Court of Canada; however, I also rely on some lower court decisions that have particular relevance to attempting to determine if the *Charter* applies to non-government bodies.

Anti-doping case law research consisted of finding anti-doping cases that have been reported in Canada as well as at the Court of Arbitration for Sport. In addition to using CanLII and WestLawNext, I also used the online decision databases for the Sport Dispute Resolution Centre of Canada and the Court of Arbitration for Sport to find anti-doping decisions that may have looked at whether or not the *Charter* applies to the CADP. I found older cases (such as *Gray v CTAF* and *In the Matter of Glen Dodds and the Sport Medicine Council of Canada*<sup>36</sup>) after reading research and commentary on anti-doping from the early 2000s because they were mentioned specifically by authors, not because the cases showed up as the result of a database search.

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<sup>36</sup> *Gray v Can Track and Field Assn* [1986], 39 ACWS (2d) 483, 1986 CarswellOnt 2878 (Ont HCJ); *In the Matter of Glen Dodds and the Sport Medicine Council of Canada*, (21 May 1987), unreported decision of an independent arbitrator, (Arbitrator: RJ Delisle).

Searching commentary (both peer-reviewed and grey literature) and noting up cases also helped me determine whether or not following the precedent from one case would help me figure out if the *Charter* applies to the CADP.

I use doctrinal research to inform my analysis of if and how the *Charter* applies to an entity like the CCES or a program like the CADP. I also use it to determine if the *Charter* has been violated by any provisions of the CADP or by the CCES, and whether or not those infringements are demonstrably justifiable in a free and democratic society.

I limited my searches to *Charter* law, rather than opening it up to the wider question of the application of public law or judicial review to the CCES and the CADP, because my aim was to explore a nexus for *Charter* application. Keeping my search focused on *Charter* case law kept me from falling down too many research rabbit holes and provided relatively predictable precedents to follow. The advantage of honing in on *Charter* cases is that searching for an answer as to whether or not the *Charter* applies to the CADP also helps find the answer for whether or not the *Charter* applies to national sport organizations—organizations that wield a lot of power when it comes to how Canadians play sport. Sport plays an important role in Canadian society and Canadian culture; I find it troubling that, despite the prominence of sport, despite using athletes as Canadian ambassadors and icons, *Charter* rights may not even be engaged for these athletes or in the context of organized sport. Although sport is primarily privately regulated, I struggle with the idea that organized sport could be a *Charter*-free zone, particularly considering the role government plays in sport and how it uses sport to achieve policy objectives (which is discussed in Chapter 2). *Charter* case law helped lead me to a middle ground where the private regulation of sport is relatively unaffected, but

sport is not entirely without public oversight through the courts if the CADP is considered public law for the purpose of *Charter* application. It also helped expose some of my own biases and made me aware of needing to avoid limiting my research to sources that only supported the outcome I wanted.

The goal of all this research was to find an answer to the question of whether or not the CADP is subject to the *Charter* as a government action. Once that question was answered, the goal shifted to demonstrating how applying the *Charter* to the CADP shows areas in which *Charter* rights are at stake, and questioning whether or not any potential infringement of these rights are demonstrably justifiable in a free and democratic society.

# Chapter 2: What is the CADP?

## 1. Introduction

The Canadian Anti-Doping Program (CADP) dictates how anti-doping is administered and enforced in Canadian sports. In its own words, the CADP is a “collective agreement” that binds “all stakeholders, athletes, athlete support personnel and other persons.”<sup>1</sup> These parties “accept the CADP as a condition of participating in sport and shall be bound by the rules contained in the [World Anti-Doping] Code and the CADP.”<sup>2</sup> The CADP is not legislation; rather, it is “a common set of rules, procedures, duties and responsibilities which are expressed in the CADP.”<sup>3</sup>

As will be shown in the forthcoming pages, the CADP is one piece of Canada’s national and international efforts to combat doping in sports, as well as a tool embedded in Canada’s arsenal of sports-based policies (including the federal-provincial/territorial *Canadian Policy Against Doping in Sport*<sup>4</sup>) that help shape Canadian society and Canada’s role in international sports and politics. The Government of Canada is not bound by the CADP, nor does it write the CADP—the Canadian Centre for Ethics in Sport (CCES), which is recognized as Canada’s national anti-doping organization, has

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<sup>1</sup> Canadian Centre for Ethics in Sport, *2015 Canadian Anti-Doping Program* (1 September 2017), online: CCES, <[cces.ca/sites/default/files/content/docs/pdf/cces-policy-cadp-2015-v2-e.pdf](http://cces.ca/sites/default/files/content/docs/pdf/cces-policy-cadp-2015-v2-e.pdf)> [CADP] at 4.1. Here and throughout, I do not duplicate the non-standard capitalization of nouns used in the CADP for ease of reading. In the CADP, non-standard capitalization is used to indicate terms defined in the Appendix.

<sup>2</sup> *Ibid* at 4.1.

<sup>3</sup> *Ibid* at 2.

<sup>4</sup> Government of Canada, *Canadian Policy Against Doping in Sport—2011* (11 February 2011), online: Canada, <[www.canada.ca/en/canadian-heritage/services/sport-policies-acts-regulations/policy-against-doping-sport.html](http://www.canada.ca/en/canadian-heritage/services/sport-policies-acts-regulations/policy-against-doping-sport.html)> [CPADS-2011]. The CPADS-2011 is the policy that commits federal and provincial/territorial governments to eradicating doping in sport implementing the CADP (See CPADS-2011 at 10, Appendix C).

that responsibility.<sup>5</sup> However, as stated in the CADP, despite governments not adopting the CADP, they still “have separate and complementary roles and responsibilities for the common goal of eliminating doping in sport.”<sup>6</sup>

The CADP is fully compliant with the World Anti-Doping Code (WADC), which means that the mandatory portions of the WADC are adopted into the CADP wholesale.<sup>7</sup> “Mandatory,” in the context of the WADC, means the provisions that national anti-doping organizations (NADOs) must incorporate into their national anti-doping program without any changes.<sup>8</sup> Mandatory provisions include definitions of terms, anti-doping rule violations, the standard of proof used in anti-doping cases, and sanctions; the international uniformity of these provisions is considered “critical for the purposes of harmonization” of anti-doping.<sup>9</sup>

This section proceeds by giving a brief history of Canada’s anti-doping efforts including how Canada has contributed to international anti-doping efforts and how the WADC influences the Canadian Anti-Doping Program. It then discusses the objectives of the CADP and how Canada has used sport as a means to promote public values and implement various policies (for example, like promoting gender equality or national unity). Finally, it moves into the operational context of the CADP, including its key provisions, legal standards, and procedures.

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<sup>5</sup> No provincial/territorial governments are bound by the CADP either. CADP, *supra* note 1 at 4.1. The CADP is a product of the CCES. CCES is Canada’s national anti-doping organization.

<sup>6</sup> *Ibid.* The CADP notes at this pinpoint that governments’ roles in eliminating doping in sport are “specifically described in the *Canadian Policy Against Doping in Sport (2011)*.”

<sup>7</sup> World Anti-Doping Agency, *World Anti-Doping Code 2015* (with 2018 Amendments) (Montreal: WADA, 2018) [WADC] at 2.3(7). The 15 mandatory sections of the WADC are laid out in art 23.2.2.

<sup>8</sup> *Ibid* at p 16. Some provisions in the code allow for flexibility in their formulation (e.g., testing for disabled athletes under Annex B—Modifications for Athletes with Impairments” in the WADA, *World Anti-Doping Code International Standards: Testing and Investigations* (Montreal: Wada, January 2017); Annex B is discussed later in Chapter 4.8).

<sup>9</sup> *Ibid* at p 17 (comment).

## 2. A Brief History of Anti-Doping in Canada: 1983 to 2019

### a. Canada's Anti-Doping Efforts at the National Level

Canada's first national anti-doping policy, *Drug Use and Doping Control in Sport: A Sport Canada Policy*, was introduced in December 1983 by the government agency Sport Canada.<sup>10</sup> This policy required national sport organizations (NSOs) to submit anti-doping plans for both in- and out-of-competition testing; funding from Sport Canada for NSOs was contingent on having anti-doping procedures in place, and funded athletes, coaches, trainers, and other support personnel also had to sign a contract with their NSO agreeing to comply with their anti-doping plan.<sup>11</sup> The Sport Medicine Council of Canada (SMCC) was responsible for administering anti-doping (that is, the testing), but the SMCC did not actually set the policies in terms of what substances or methods were banned, nor did it determine how often to test, when and where to test, or who to test. All of that was determined by each NSO, which often relied heavily on the anti-doping policies of the international sport federation or the International Olympic Committee (IOC).<sup>12</sup>

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<sup>10</sup> Sport Canada, *Drug Use and Doping Control in Sport: A Sport Canada Policy* (Ottawa: Minister of State, Fitness and Amateur Sport, 1984) [1983 Policy]. Sport Canada was founded in 1971. It was formed following the recommendations of the 1969 *Task Force on Sports for Canadians*, which was commissioned by the federal government to inquire into the state of sport in Canada. See Canada, *Report of the Task Force on Sport for Canadians* (Ottawa: Queen's Printer, 1969). Sport Canada now falls under the umbrella of Canadian Heritage, though it has previously fallen under other ministries, including health. Sport Canada is "the agency through which the Government of Canada is involved in high performance sport. Sport Canada is mandated to create policy, award grants, administer program initiatives and to support sport's contribution to Canadian identity and culture and advance the goals in the Canadian Sport Policy." See Lisa Kikulis, "Contemporary Issues in High Performance Sport" in Lucie Thibault & Jean Harvey, eds, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013) 97 at 105.

<sup>11</sup> Charles Dubin, *Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance*, (final report of commission), Commissioner Charles Dubin (Ottawa: Minister of Supply and Services Canada, 1990) at xvii, 90 [Dubin Commission]. See also 1983 Policy, as cited in Dubin Commission at 90-94.

<sup>12</sup> Dubin Commission, *ibid*; Rob Beamish, "Olympic Ideals versus the Performance Imperative: The History of Canada's Anti-Doping Policies" in Lucie Thibault & Jean Harvey, eds, *Sport Policy in Canada* (Ottawa: University of Ottawa Press 2013), 217 at 221-222.

The 1983 policy was not a proactive program borne out of consultative process. Instead, the Canadian government jumped into anti-doping action after Canadian athletes were caught doping at the 1983 Pan American (Pan Am) Games in Caracas, Venezuela. At these games, 19 athletes tested positive for steroids, including two Canadian weightlifters.<sup>13</sup> These games were dubbed “the pharmaceutical games,” and several athletes left shortly after arriving without even competing when stricter doping control measures were announced.<sup>14</sup> At the final Canadian press conference at the 1983 Pan Am Games, Sport Canada emphasized Canada’s commitment to fighting doping in sports, saying that it welcomed regular testing of athletes, both in and out of competition.<sup>15</sup> Charles Dubin, who was appointed in 1988 to investigate doping in Canadian sport, credits the positive drug tests from the 1983 Pan Am Games as being the “prime motivation behind the Canadian government’s involvement in doping control.”<sup>16</sup>

Another exacerbating factor accelerating the development of a Canadian anti-doping program was the detention of four Canadian weightlifters and coaches at the Montreal airport in October 1983; they were returning from a competition in Moscow and had 22,000 steroid pills with them.<sup>17</sup> Following this incident, the Minister of Sport “made a spontaneous statement” saying that NSOs must take measures to prevent their athletes from doping or they would no longer receive federal funding.<sup>18</sup> This condition became one of the features of the 1983 Sport Canada anti-doping policy, released only

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<sup>13</sup> Dubin Commission, *supra* note 11 at 182.

<sup>14</sup> *Ibid*, quoting Cecil Smith at 182.

<sup>15</sup> *Ibid* at 182, citing Government of Canada Press release.

<sup>16</sup> *Ibid* at 90.

<sup>17</sup> *Ibid* at 149.

<sup>18</sup> Donald McIntosh, Thomas Bedecki & CES Franks, *Sport and Politics in Canada: Federal Government Involvement Since 1961* (Kingston: McGill-Queen’s University Press, 1987) at 149.

two months later. When the 1983 anti-doping policy was released, it was “one of the most stringent in the world.”<sup>19</sup>

In addition to the official Sport Canada policy, the Canadian Olympic Association (COA) also issued its own anti-doping policy in 1984. According to the COA, its policy “stemmed from, and complemented” Sport Canada’s federal policy.<sup>20</sup> For example, the COA policy made it clear “the national sport policy would be applied to any athletes eligible for nomination to, or performing as a member of, any team participating in sport competitions that fell under the COA’s jurisdiction.”<sup>21</sup> The COA policy also followed the prohibitions listed in the Olympic Charter and the IOC medical commission.<sup>22</sup>

Although anti-doping measures at the 1983 Pan Am Games apparently took some athletes by surprise, anti-doping had started to become an issue at international events as early as 1960, even though no in-competition testing happened until 1973.<sup>23</sup>

Canada’s 1983 anti-doping policy was revised and re-released by Sport Canada in 1985 and included stronger sanctions for anti-doping violations;<sup>24</sup> NSOs were still responsible for setting their own anti-doping plans.<sup>25</sup> Government funding for NSOs

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<sup>19</sup> Dubin Commission, *supra* note 11 at xvii.

<sup>20</sup> Beamish, *supra* note 12 at 222. But also note the quotation from the technical director of the COA in 1983 following the PanAm Games, quoted by Beamish at 221: “Let’s face it. This is competition. You play to win. This isn’t recreation.”

<sup>21</sup> *Ibid* at 222.

<sup>22</sup> *Ibid*.

<sup>23</sup> At the 1960 Summer Olympics, the death of a cyclist was connected to his use of performance-enhancing drugs. This is discussed in slightly more detail in section 2.b of this chapter. See also Beamish, *supra* note 12 at 220.

<sup>24</sup> Sport Canada, *Drug Use and Doping Control in Sport: A Sport Canada Policy, Update (September 1985)* (Ottawa: Minister of State, Fitness and Amateur Sport, 1985) [1985 Policy]; reproduced in *Dubin*, *supra* note 11 at 611-613.

<sup>25</sup> Beamish, *supra* note 12 at 222; see also Dubin Commission, *supra* note 11 at 90. Most national sport organizations (NSOs) followed the anti-doping rules and definitions set by the international federation. See e.g., Dubin, *ibid* at 218. The Canadian Olympic Association’s anti-doping policy was different from Sport Canada’s but still applied to NSOs in that “any athletes eligible for nomination to, or performing as a member of, any team participating in sport competitions that fell under the COA’s jurisdiction” (i.e., Olympic Games, Pan Am Games). See Beamish, *supra* note 12 at 222.



continued to be contingent on having an anti-doping policy in place, but NSOs also argued they had insufficient funding for out-of-competition testing, and thus anti-doping efforts were limited to in-competition testing only.<sup>26</sup> The anti-doping policies and sanctions of organizations like the COA also became more stringent, following the lead of Sport Canada's 1985 anti-doping policy.<sup>27</sup>

The relatively uncoordinated approach to anti-doping in Canada continued until the early 1990s. Following Ben Johnson's positive drug test at the 1988 Seoul Olympics, the federal government convened the *Commission of Inquiry Into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance*, headed by Charles Dubin.<sup>28</sup> Commissioner Dubin recommended that the SMCC (the central (and independent) agency that was, at the time, responsible for conducting Canadian anti-doping testing) coordinate anti-doping testing.<sup>29</sup> As Rob Beamish, a professor of sociology who specializes in high performance sport, points out, "the inquiry's recommendations shaped

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<sup>26</sup> Dubin Commission, *supra* note 11 at 217-18.

<sup>27</sup> Beamish, *supra* note 12 at 224.

<sup>28</sup> Dubin Commission, *supra* note 11 at 585-86 (Appendix A). The Commission was convened by an Order in Council (OIC) and was established pursuant to the *Inquiries Act*, RSC 1985, c I-11. The terms of reference for the Commission in the OIC were broad enough that Dubin had jurisdiction to make his own procedures and establish his own advisory panel. The Preamble to the OIC states: "Whereas there is a clear public concern with respect to the use of various drugs and banned practices intended to increase athletic performance; and whereas recent events warrant the establishment of an inquiry with the capacity to examine the issues and determine the facts with respect to the use of such drugs and banned practices; therefore [...] commission to inquire into and report on the facts and circumstances surrounding the use of such drugs and banned practices by Canadian athletes [...] and to inquire into and make recommendations regarding the issues related to the use of such drugs and banned practices in sport." The Commission took nearly a year to complete, with public hearings taking place between January and October 1989, 119 witnesses testifying (amounting to more than 14,800 pages of testimony), 295 exhibits, and 25 public briefs. See Dubin Commission at xxi-xxii.

<sup>29</sup> Beamish, *supra* note 12 at 230. Dubin Commission, *supra* note 11 at 538. According to Barrie Houlihan, prior to the Dubin Commission, "The main responsibility of the SMCC was to establish the details of the testing procedures and included the mechanics of sample collection, analysis, notification of results to the governing body and athlete, the conduct of appeals, and the organization of arbitration arrangements." NSOs were responsible for selecting who to test and what the penalties should be; the SMCC had no role in setting anti-doping policy or penalties. See Barrie Houlihan, *Sport, Policy and Politics: A Comparative Analysis* (New York: Routledge, 2002) at 191-92.

the legal and policy structure for banned performance-enhancing substances.”<sup>30</sup> This included the creation of the Canadian Anti-Doping Organization (CADO) in 1991, which took over responsibility for anti-doping from the SMCC.<sup>31</sup> The CADO was entirely funded by Sport Canada and started operating in January 1992; it changed its name to the Canadian Centre for Drug-Free Sport (CCDS) that year.<sup>32</sup> Its “sole” mandate was to “coordinate all anti-doping programs in Canada.”<sup>33</sup> The Centre received a \$3.1 million operating budget from the federal government, a step that Beamish argues “backed [the government’s] claim that Canada was at the forefront of the war against drugs in high performance sport.”<sup>34</sup>

The CCDS marked a major change in anti-doping policy and enforcement because it represented a unified approach to anti-doping across Canada. NSOs were no longer responsible for making and implementing their own anti-doping plans; instead they had to comply with Canada’s national anti-doping policy—a condition on which their funding remained contingent (as under the 1983, 1985, and 1991 anti-doping policies).<sup>35</sup> The CCDS played a much bigger role than the SMCC in developing an anti-

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<sup>30</sup> Beamish, *supra* note 12 at 227.

<sup>31</sup> The CADO was incorporated as a not-for-profit corporation, not as an agency of the government. It was incorporated under the *Canada Corporations Act*, RSC 1970, c C-32. Delegating anti-doping responsibility to the CADO over the SMCC contributed to the eventual dissolution of the SMCC in the mid-1990s, which is largely due to Sport Canada discontinuing its funding. See Parissa Safai, “The Demise of the Sport Medicine and Science Council of Canada” (2005) 36 *Sport History Rev* 91 at 97.

<sup>32</sup> Canadian Centre for Ethics in Sport, “History of Anti-Doping in Canada,” (last visited 14 August 2019), online: *CCES* <[cces.ca/history-anti-doping-canada](http://cces.ca/history-anti-doping-canada)> [CCES History].

<sup>33</sup> Government of Canada Fitness and Amateur Sport, news release, “Danis Unveils Anti-Doping Strategy” (9 January 1991), online: *CCES*, <[cces.ca/sites/default/files/content/docs/pdf/goc-mr-cadoannouncement-e.pdf](http://cces.ca/sites/default/files/content/docs/pdf/goc-mr-cadoannouncement-e.pdf)> [Danis news release].

<sup>34</sup> Beamish, *supra* note 12 at 230-31.

<sup>35</sup> Sport Canada, *Canadian Policy on Penalties for Doping in Sport* (Ottawa: Minister of State, Fitness and Amateur Sport, 1991). This policy was announced at the same time as the creation of the CCDS, which, according to the press release announcing its creation, was designated to “coordinate the involvement of federal/provincial/territorial governments, sport bodies, educators, medical personnel and others in order to develop and implement significant new Canadian anti-doping measures and policies.” See Danis news release, *supra* note 33 at 2. The first iteration of the *Canadian Policy Against Doping in Sport* was also

doping program; its responsibilities included educational campaigns, sample collection, chain of custody control of test samples, results management, protests, appeals, reinstatements; it was also active in refining anti-doping policy and could decide which athletes to test.<sup>36</sup>

In 1995, the CCDS merged with the Fair Play Commission of Canada<sup>37</sup> to form the Canadian Centre for Ethics in Sport. (The Fair Play Commission was formed in 1986 with the goal of “eradication of excessive violence in sports” through educational campaigns.<sup>38</sup>) The CCES is an independent<sup>39</sup> not-for-profit incorporation, incorporated under the *Canada Not-For Profit Corporations Act*.<sup>40</sup>

The CCES is the current administrator of the CADP and is recognized nationally as Canada’s national anti-doping organization (NADO) by the federal-provincial/territorial *Canadian Policy Against Doping in Sport—2011* (CPADS-2011), and internationally as Canada’s NADO by the World Anti-Doping Agency (WADA).<sup>41</sup>

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released in 1991. See also Joseph De Pencier, “Law and Athlete Drug Testing in Canada” (1994) 4:2 *Marq Sports L Rev* 260 at 269.

<sup>36</sup> See Houlihan 2002, *supra* note 29 at 196-97.

<sup>37</sup> The Fair Play Commission of Canada was established by Otto Jelinek in 1986 and its focus was on reducing violence in sports: See e.g., House of Commons, Standing Committee on National Health and Welfare, *Evidence*, 33-2, vol 1, no 1-21 (13 May 1987) at 1910 (Otto Jelinek), online: *Canadian Parliamentary Historical Resources*, <parl.canadiana.ca/view/oop.com\_HOC\_3302\_49\_1/675?r=0&s=1>. See also CCES History, *supra* note 32.

<sup>38</sup> See *House of Commons Debates*, 33-2, Vol 5 (6 May 1987) at 5803 (Otto Jelinek), online: *Canadian Parliamentary Historical Resources*, <parl.canadiana.ca/view/oop.debates\_HOC3302\_05/511?r=0&s=1>. Wayne Gretzky was appointed honorary chairman of the commission.

<sup>39</sup> As will be discussed in Chapter 3.4, the CCES is independent of government (despite being substantially funded by the federal government) and the NSOs or other organizations for whom it performs anti-doping services.

<sup>40</sup> *Canada Not-for-Profit Corporations Act*, SC 2009, c 23. See also Government of Canada, “Federal Corporation Information - 271193-1” (last modified 22 May 2019), online: *Innovation, Science and Economic Development Canada*, <www.ic.gc.ca/app/scr/cc/CorporationsCanada/fdrlCrpDtls.html?corpId=2711931&V\_TOKEN=1556389325349&crpNm=canadian%20centre%20for%20ethics%20in%20sport&crpNmbr=&bsNmbr=>.

<sup>41</sup> CPADS-2011, *supra* note 4 at 3; World Anti-Doping Agency, “Code Signatories,” (last visited 17 September 2019), online: *WADA*, <www.wada-ama.org/en/what-we-do/the-code/code-signatories#GovernmentFundedOrganizations>. The 1991 *Canadian Policy Against Doping in Sport* [CPADS] named the CCDS as the body responsible for anti-doping; see De Pencier, *supra* note 35 at 271,

Historically (and currently), anti-doping efforts rely on multiple players at multiple levels of sports. For example, in the 1980s when NSOs were responsible for designing their own anti-doping plans, many would follow the anti-doping guidelines of their international federations or the IOC. Without prodding by the federal government though, reinforced by the COA's anti-doping policy, NSOs may not have adopted any anti-doping policies at all, let alone—as noted by Dubin—undertaken any testing except in-competition testing done at major events.<sup>42</sup>

Until 2004, when the WADC came into effect,<sup>43</sup> the IOC was the main anti-doping policy-maker at the international level.<sup>44</sup> Since the arrival of the WADC, WADA appears to be the main international player in terms of dictating anti-doping policies and procedures. That said, federal and provincial governments continue to play an active role in anti-doping through policies and actions including (but not limited to) the CPADS-2011, the requirement that any federally funded athlete comply with the CADP,<sup>45</sup> funding

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as did the 1991 *Policy on Penalties for Doping in Sport*, *supra* note 35. The 1991 CPADS was the first federal/provincial/territorial agreement on anti-doping; it was updated in 1995 and 2000, and replaced in 2004 by a new *Canadian Policy Against Doping in Sport* that reflected the WADC. See Federal-Provincial-Territorial Conference of Ministers Responsible for Sport, Recreation and Fitness, news release, “Ministers Adopt New Canadian Policy on Doping in Sport” (30 April 2004), online: *Canadian Intergovernmental Conference Secretariat*, <[scics.ca/en/product-produit/news-release-ministers-adopt-new-canadian-policy-on-doping-in-sport/](http://scics.ca/en/product-produit/news-release-ministers-adopt-new-canadian-policy-on-doping-in-sport/)>. The CPADS-2011 is an updated version of the 2004 CPADS.

<sup>42</sup> See Dubin Commission, *supra* note 11 at 128: “virtually all testing to date has been on the day of competition.” Dubin noted that both the 1983 and 1985 policies allowed for out-of-competition testing, but out-of-competition testing programs was not done because of the expense. See also Beamish, *supra* note 12 at 222-224 for more information on the COA and anti-doping; and see De Pencier, *supra* note 35 at 265: “The premise underlying the government's action [in 1991] was that sport governing bodies were incapable or unwilling to deal with doping, even if anti-doping rules were well-established in some of the more problematic sports.”

<sup>43</sup> The WADC, *supra* note 7, is the product of the World Anti-Doping Agency WADA. Both the WADC and WADA are discussed further in Part 2.c of this chapter.

<sup>44</sup> The IOC Medical Commission was established in 1967 and the first anti-doping testing took place at the 1968 Olympics. To compare, the International Association of Athletics Federations (IAAF) formed its Medical Committee in 1972. See Dubin Commission, *supra* note 11 at 70-71.

<sup>45</sup> E.g., athletes who are funded through the Athlete Assistance Program are required to consent to the CADP as a condition of their funding. See Canadian Heritage, *Sport Canada Athlete Assistance Program Policies and Procedures*. (Ottawa: Public Works and Government Services Canada, 2015).

for NSOs and athletes, funding the CCES, and through sustained funding of the CADP itself (which is done through funding the CCES and by providing NSPs with funding that can be used for anti-doping<sup>46</sup>). Governments also partially fund WADA.<sup>47</sup> Governments themselves are not signatories of the WADC, but instead are bound by the 2005 UNESCO Convention Against Doping in Sport.<sup>48</sup> The UNESCO Convention effectively adopts the WADC,<sup>49</sup> which effectively obligates states to follow the WADC in national anti-doping efforts.

When the WADC came into effect, The Canadian Anti-Doping Program immediately shifted so as to be fully WADC compliant.<sup>50</sup> This was done (presumably) to help achieve the goal of internationally harmonized anti-doping, and to continue to show Canadian leadership in anti-doping at the international level, not to mention maintaining eligibility to compete at events like the Olympics.<sup>51</sup> As the WADC has been updated and revised,

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<sup>46</sup> E.g., under the Sport Support Program (SSP), discussed further in Chapter 3.4.d.iv, anti-doping is one of the enumerated expenses for which SSP funding may be used.

<sup>47</sup> Half of WADA's funding comes from the Olympic Movement (that is, the IOC as well as national Olympic committees); the other half of its funding comes from state governments. In 2019, WADA received US\$17,335,527 from the Olympic Movement and US\$17,335,527 from state governments. Canada contributed US\$1,256,826 to WADA's 2019 Budget; only the United States (US\$2,513,651) and Japan (US\$1,502,800) contributed more. See World Anti-Doping Agency, "Contributions to WADA's Budget" (19 July 2019), online: *WADA*, <[www.wada-ama.org/en/resources/finance/contributions-funding](http://www.wada-ama.org/en/resources/finance/contributions-funding)>.

<sup>48</sup> UNESCO *International Convention Against Doping in Sport 2005*, 19 October 2005, 2419 UNTS 201 (entered into force 1 February 2007) [UNESCO Convention].

<sup>49</sup> *Ibid* at Art 2: "These definitions are to be understood within the context of the World Anti-Doping Code."

<sup>50</sup> Beamish, *supra* note 12 at 235.

<sup>51</sup> See e.g., Canadian Intergovernmental Conference Secretariat, *supra* note 41: "By endorsing the new Canadian Policy Against Doping in Sport, federal, provincial and territorial Ministers have re-affirmed Canada's international leadership role in the fight against doping in sport." See also CPADS-2011, *supra* note 4 at 1, 3. Richard Pound, the first chair of WADA, is Canadian, and WADA's headquarters are in Montreal; accordingly, it would not look good if Canada was not committed to implementing the WADC domestically.

**Table 1: Canada's Anti-Doping Policies and Programs, 1983-2015**

<b>Policy Name</b>	<b>Year</b>	<b>Written/Issued by</b>
<i>Drug Use and Doping in Sport: A Sport Canada Policy</i>	1983	Sport Canada
<i>Drug Use and Doping in Sport: A Sport Canada Policy, Update (September 1985)</i>	1985	Sport Canada
<i>Doping Control Standard Operating Procedures</i>	1984-91	SMCC (updated by the SMCC)
<i>Canadian Policy on Penalties for Doping in Sport</i>	1991	Sport Canada
<i>Canadian Policy Against Doping in Sport</i>	1991	Federal-Provincial/Territorial governments
<i>Doping Control Standard Operating Procedures</i>	1992	CCDS (adopted from SMCC)
<i>Standard Operating Procedures for Doping Control</i>	1993	CCDS
<i>Canadian Policy on Penalties for Doping in Sport</i>	1994	Sport Canada & CCDS
<i>Canadian Policy on Doping in Sport</i>	1999	Sport Canada
<i>Canadian Doping Control Regulations</i>	1999	CCES
<i>Canadian Policy Against Doping in Sport</i>	2004	Federal-Provincial/Territorial governments
<i>Canadian Anti-Doping Program</i>	2004	CCES
<i>Canadian Policy Against Doping in Sport</i>	2008	Federal-Provincial/Territorial governments
<i>Canadian Anti-Doping Program</i>	2009	CCES
<i>Canadian Policy Against Doping in Sport (2011)</i>	2011	Federal-Provincial/Territorial governments
<i>Canadian Anti-Doping Program</i>	2015	CCES

the CADP has also been updated and revised to implement those changes;<sup>52</sup> the most recent iteration of the CADP is fully compliant with the WADC and the WADA Prohibited List.<sup>53</sup> Any Canadian who is a member of an organization that has signed on to the CADP is bound by it through the agreement they sign as part of the membership requirements. Any Canadian athlete who is on a national team or receives funding through the Athlete Assistance Program is also required to adhere to the CADP as part of their contract with Sport Canada, and their federal funding is contingent on complying with the CADP.

The CADP is one part of a nation-wide effort aimed at keeping sports drug-free. It reflects Canada's anti-doping efforts at the national level, but it also represents a portion of Canada's anti-doping efforts at the international level.

#### b. Canada's Anti-Doping Efforts in the International Context

Canada has played an active role in combatting doping in sports internationally and has been pivotal in creating and supporting global anti-doping policies. Anti-doping efforts date back as far as 1960, prompted by concern for athletes' health when a Danish cyclist at the 1960 Summer Olympics in Rome died after taking amphetamines and nicotiny tartrate.<sup>54</sup> Although the IOC, Council of Europe, and a few European countries implemented anti-doping measures in the early and mid 1960s, no drug testing took place

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<sup>52</sup> The CCES is responsible for updating and revising the CADP. This is part of its obligations under the WADC as Canada's national anti-doping organization (NADO). See WADC, *supra* note 7 at 20.5.2.

<sup>53</sup> CADP, *supra* note 1 at 83, Appendix 4: Revision History. The next anticipated major revision to the CADP will be released in 2021 as the next version of the WADC is scheduled to be updated then with major updates. See also World Anti-Doping Agency, "2021 Code Review" (last visited 17 September 2019), online: WADA, <[www.wada-ama.org/en/what-we-do/the-code/2021-code-review](http://www.wada-ama.org/en/what-we-do/the-code/2021-code-review)>.

<sup>54</sup> For an overview of significant events with respect to anti-doping in Canada and the rest of the world, see Dubin Commission, *supra* note 11 at 71-74. Beamish and others point out while drugs were initially suspected in the cyclist's death, they were not the ultimate cause; however, this incident is still seen as the main impetus behind the advent of anti-doping). See e.g., Beamish, *supra* note 12 at 220.

at the Olympics until 1968.<sup>55</sup> Throughout the 1970s, the anti-doping movement continued to grow with more countries enacting anti-doping regulations and drug testing increased at major events.<sup>56</sup> The first positive test for a Canadian happened in 1975 at the Pan Am Games in Mexico City—the only Canadian positive test at a major athletic event until the 1983 Pan Am Games.<sup>57</sup> As mentioned above, the 1983 Pan Am Games and subsequent smuggling incident propelled the Canadian government into near-instant action on anti-doping domestically and internationally. In fact, the government believed its 1985 policy against doping in sport took “a world leadership role” in trying to eradicate drugs in sports, and Otto Jelinek, the Minister of State for Fitness and Amateur Sport, stated “we have also taken the leadership role internationally in trying to get the rest of the world to come on board and formulate a policy that will be the same for all participating countries around the world.”<sup>58</sup> Jelinek also noted that in the lead up to the 1988 Calgary Olympics, Canada was working “very closely” with the IOC on anti-doping policies and drug testing for the Olympics, something that he felt “moved Canada a step forward in the international area of drug testing and doping in sport.”<sup>59</sup>

As early as 1990, Dubin noted, “It is a matter of record, not merely of national pride, that Canada has been a leader in the fight against doping in sport.”<sup>60</sup> Dubin’s assertion is echoed in the CPADS-2011, which states, “There is a strong history of Canadian commitment to doping-free sport. [...] These domestic anti-doping initiatives have been mirrored by an increasingly comprehensive global fight against doping in

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<sup>55</sup> Dubin Commission, *supra* note 11 at 72-73.

<sup>56</sup> *Ibid* at 74.

<sup>57</sup> *Ibid* at 72.

<sup>58</sup> Jelinek, House of Commons, Standing Committee on National Health and Welfare (13 May 1987), *supra* note 37 at 1910.

<sup>59</sup> *Ibid* at 1945.

<sup>60</sup> Dubin Commission, *supra* note 11 at 535.



sport.”<sup>61</sup> The introduction to the CADP says, “Canada enjoys a rich history as a sporting nation [that] includes a longstanding commitment to fair, ethical and doping-free sport.”<sup>62</sup>

Canadian leadership and involvement in global anti-doping policy-making includes requesting (and being granted) observer status to attend the Council of Europe's Committee for the Development of Sport/Experts Committee on Anti-Doping in Sport in 1985, tabling proposals and recommendations at the Council of Europe, which were endorsed by European sports ministers in 1986, and hosting the First Permanent World Conference on Antidoping in Sport in June 1988.<sup>63</sup> The 1988 conference on anti-doping is significant in that it was primarily state governments who attended, although the IOC co-hosted the conference and adopted the anti-doping charter drafted at the conference.<sup>64</sup>

The Dubin Commission convened after the 1988 Summer Olympics is also seen as a significant moment in anti-doping internationally. When it was released, it was recognized as “the single most important published source” in Canadian sports law,<sup>65</sup> and has been cited numerous times in anti-doping research for its influence on shaping anti-doping policy beyond the Canadian stage.<sup>66</sup>

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<sup>61</sup> CPADS-2011, *supra* note 4 at 2.

<sup>62</sup> CADP, *supra* note 1 at 1.0.

<sup>63</sup> Dubin Commission, *supra* note 11 at 74.

<sup>64</sup> Caitlin Jenkins, *Establishing a World Anti-Doping Code: WADA's Impact on the Development of an International Strategy for Anti-Doping in Sport* (Masters Thesis, University of Windsor Faculty of Human Kinetics, 2006) [unpublished] at 71. See also Dubin Commission, *supra* note 11 at 415.

<sup>65</sup> John Barnes, “Recent Developments in Canadian Sports Law” (1991) 23:3 *Ottawa L Rev* 623 at 627.

The lack of critical commentary on this report is in contrast to some scathing critiques of the McLaren report into the Russian state-sponsored doping scandal, which has even prompted lawsuits against WADA and Richard McLaren himself. See e.g., *Sveshinikov v World Anti-Doping Agency*, 2018 ONSC 7245.

<sup>66</sup> See e.g., Ian Ritchie & Greg Jackson, “Politics and ‘Shock’: Reactionary Anti-Doping Policies in Canadian and International Sport” (2014) 6:2 *Intl J Sport Policy & Politics* 195; Ian Ritchie, “The Construction of a Policy: The World Anti-Doping Code's ‘Spirit of Sport’ Clause” (2013) 2 *Performance Enhancement & Health* 194; John J MacAloon, “Steroids and the State: Dubin, Melodrama and the Accomplishment of Innocence” (1990) 2:2 *Public Culture* 41.

In 1990, Canada signed a tri-lateral anti-doping agreement with the United Kingdom and Australia.<sup>67</sup> In 1997, the CCES entered a trilateral agreement with the Australian Sports Drug Agency and the United States Olympic Committee, which aimed to focus on joint research, education and monitoring.<sup>68</sup>

In 1999, the World Anti-Doping Agency was formed after a World Conference on Doping in Sport (hosted by the International Olympic Committee in Lausanne, Switzerland).<sup>69</sup> WADA is an international non-government organization; its foundation board and executive committee, which are responsible for its governance, comprise members representing state governments and the Olympic movement.<sup>70</sup> The WADA headquarters (until at least 2031) are in Montreal, Quebec.<sup>71</sup> Canadian Richard Pound was the first chairman of WADA.<sup>72</sup> Canada's national anti-doping agency is a signatory to the World Anti-Doping Code, which was developed by WADA and came into effect in 2004.

While WADA has the ability to dictate anti-doping rules to national anti-doping organizations, it has no such power over state governments. In order to address the gap between NADOs and state governments, governments are bound by the UNESCO

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<sup>67</sup> CCES History, *supra* note 32.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> The Olympic Movement and state governments share equal representation on the WADA foundation board and executive committee. See World Anti-Doping Agency, "Governance" (last visited 22 August 2019), online: *WADA*, <[www.wada-ama.org/en/governance](http://www.wada-ama.org/en/governance)>.

<sup>71</sup> See "World Anti-Doping Agency Headquarters will Stay in Montreal until 2031," *CBC News* (15 November 2017), online: *CBC*, <[www.cbc.ca/news/canada/montreal/world-anti-doping-agency-headquarters-will-stay-in-montreal-until-2031-1.4404435](http://www.cbc.ca/news/canada/montreal/world-anti-doping-agency-headquarters-will-stay-in-montreal-until-2031-1.4404435)>. Quebec has legislation granting immunities to WADA; see *An Act Respecting the Immunities Granted to the World Anti-Doping Agency*, SQ 2018, c 33.

<sup>72</sup> Lynn Robson, "World Anti-Doping Agency Chooses Canada for its Headquarters," *CBC: The National* (21 August 2001), online: *CBC Archives* <[www.cbc.ca/archives/entry/world-anti-doping-agency-chooses-canada-for-headquarters](http://www.cbc.ca/archives/entry/world-anti-doping-agency-chooses-canada-for-headquarters)>. Richard Pound was also the vice-chair of the IOC. He swam for Canada at the 1960 summer Olympics in Rome. He was president of the Canadian Olympic Committee 1977-1982, and was first elected to the IOC in 1978. See Mélanie Dugré, "Mtre Richard W Pound" (22 August 2017), online: *The Bar of Montreal* <[www.barreaudemontreal.qc.ca/en/avocats/mtre-richard-w-pound](http://www.barreaudemontreal.qc.ca/en/avocats/mtre-richard-w-pound)>.

Convention Against Doping in Sport (UNESCO Convention).<sup>73</sup> Groundwork for the UNESCO Convention started in 1999, and the UN voted to take action against doping through a Convention in 2003; the Convention was adopted in October 2005 and came into force in February 2007.<sup>74</sup>

The Convention “represents the first time that governments around the world have agreed to apply the force of international law to anti-doping.”<sup>75</sup> It “helps to ensure the effectiveness of the World Anti-Doping Code,” because the Convention “provides the legal framework under which governments can address specific areas of the doping problem that are outside the domain of the sports movement.”<sup>76</sup> One way, for example, the Convention assigns specific tasks that are beyond the jurisdiction of sport organizations to governments is by withholding government funding from athletes who have committed anti-doping rule violations.

Canada was the second country to sign the Convention.<sup>77</sup> The Convention commits Canada to restrict the availability of prohibited substances or methods, withdraw financial support from individuals or organization who commit anti-doping rule violations, facilitate doping control and national testing programs, and support anti-doping education.<sup>78</sup> Canada accepted the Convention, which gives it legal effect and

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<sup>73</sup> UNESCO Convention, *supra* note 48. The use of “governments” here refers only to those governments who have signed the Convention.

<sup>74</sup> UNESCO, “Background to the Convention” (last visited 15 August 2019), online: *UNESCO*, <[www.unesco.org/new/en/social-and-human-sciences/themes/anti-doping/international-convention-against-doping-in-sport/background/](http://www.unesco.org/new/en/social-and-human-sciences/themes/anti-doping/international-convention-against-doping-in-sport/background/)>; Paul Marriott-Lloyd, *Understanding the International Convention Against Doping in Sport* (UNESCO, 2010) at 2.

<sup>75</sup> UNESCO, “Background to the International Convention Against Doping in Sport,” *supra* note 48.

<sup>76</sup> *Ibid.*

<sup>77</sup> Sweden was the first country to sign the Convention; more than 170 countries have now signed it. See UNESCO, “International Convention against Doping in Sport. Paris, 19 October 2005” (last visited 15 August 2019), online: *UNESCO*, <[www.unesco.org/eri/la/convention.asp?KO=31037&language=E](http://www.unesco.org/eri/la/convention.asp?KO=31037&language=E)>

<sup>78</sup> UNESCO Convention, *supra* note 48 at Arts 8, 11, 12, 19-23. See also Marriott-Lloyd, *supra* note 74 at 4.

creates binding obligations, even though Canada did not ratify the treaty or introduce it for debate in the Canadian parliament.<sup>79</sup> This wholesale acceptance of the Convention demonstrates Canada's endorsement of doping-free sport internationally.

### c. The Effects of the WADC on Canada's Anti-Doping Policy Development

Canada's current anti-doping program is based on the World Anti-Doping Code (WADC), rather than written completely from scratch. The first WADC came into effect in 2004. WADA is an international non-governmental organization; it cannot legally compel national governments to comply with the code.<sup>80</sup> Rather, only national anti-doping organizations are bound by the WADC.<sup>81</sup> This means that while the CCES is committed to implementing and enforcing the WADC, the Canadian government actually has no obligation to do so under the WADC. Canada is instead obligated to support the WADC through the UNESCO Convention.<sup>82</sup>

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<sup>79</sup> This is discussed further in Chapter 3.4.d.ii. Accepting or ratifying treaties gives them legal effect. See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155, 118232 UNTS 331 (entered into force 27 January 1980) at Arts 2(1)(b) & 14(2); see also United Nations Treaty Collection, "Glossary" (last visited 17 September 2019), online: *United Nations Treaty Collection*, <[treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1\\_en.xml](http://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml)>.

<sup>80</sup> See e.g., Kathryn Henne, "WADA, the Promises of Law and the Landscapes of Antidoping Regulation," (2010) 33:2 *Political and Leg Anthropology Rev* 306; Wagner and Hanstad use "INGO" to describe WADA and the IOC. See Ulrik Wagner & Dag Vidar Hanstad, "Scandinavian Perspectives on Doping—a Comparative Policy Analysis in Relation to the International Process of Institutionalizing Anti-Doping" (2011) 3:3 *Intl J Sport, Policy & Politics* 355. Henne at 307 describes an INGO as "a mode of alternative dispute resolution designed to provide oversight in an arena of human activity; they are therefore, in most cases, outside the adjudicatory authority of the state." Wagner & Hanstad at 359 say WADA is an INGO because, "it is created as an interface primarily for sport, political and legal forces but operates on a level beyond the nation state."

<sup>81</sup> NADOs are signatories to the WADC. As a signatory, they must take three steps to comply with the WADC: accept and agree to the tenets of the code, implement the WADC's mandatory articles and principles, and enforce the WADC. See World Anti-Doping Agency, "National Anti-Doping Organizations (NADO)" (last visited 15 August 2019), online: *WADA*, <[www.wada-ama.org/en/who-we-are/anti-doping-community/national-anti-doping-organizations-nado](http://www.wada-ama.org/en/who-we-are/anti-doping-community/national-anti-doping-organizations-nado)>.

<sup>82</sup> UNESCO Convention, *supra* note 48 at Arts 13-16.

With the advent of the WADC, and Canada's early adoption of the UNESCO Convention, came "a complete overhaul" of the Canadian anti-doping system.<sup>83</sup> According to Beamish, Canada's 2004 *Policy Against Doping in Sport* indicated "Canada's complete surrender of autonomy in the policies governing performance-enhancing substances in sport."<sup>84</sup> The policy reinforces Canada's commitment to the World Anti-Doping Program, and "recognizes the role of the World Anti-Doping Agency in setting global standards and coordinating anti-doping world-wide."<sup>85</sup> The 2004 policy seems to indicate that Canada was keen to adopt the WADC as a federal policy, though lacked a mechanism to do so without impeding the CCES's independence in administering anti-doping.

However, while Canada may seem to have little autonomy in writing its anti-doping program, previous Canadian anti-doping policies and programs were already heavily based on international anti-doping efforts, like the IOC anti-doping code or anti-doping codes implemented by international federations.<sup>86</sup> Additionally, the WADC does not dictate every letter of the CADP. It has sections that Canada may not deviate from,<sup>87</sup>

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<sup>83</sup> Beamish, *supra* note 12 at 235. This policy was developed by the federal, provincial, and territorial governments and commits them to eradicating doping in sport; it is the precursor of the CPADS-2011, though the first federal-provincial/territorial government policy on anti-doping was the 1991 Policy Against Doping in Sport, *supra* note 41.

<sup>84</sup> Beamish, *supra* note 12 at 235.

<sup>85</sup> *Canadian Policy Against Doping in Sport (2004)* as cited in Beamish, *ibid*, at 235.

<sup>86</sup> See e.g., Dubin, *supra* note 11 at 218 (where he explains that the CTAF's doping control policy relied on the definitions of doping substances from the IAAF's anti-doping rules); Beamish, *supra* note 12 at 220-21.

<sup>87</sup> WADA has a compliance monitoring system to ensure that NADOs are in fact upholding their commitment to implement and enforce the WADC in their national anti-doping efforts. It includes completing code compliance questionnaires, undertaking audits, and participating in compliance monitoring. See World Anti-Doping Agency, "Compliance Monitoring Program" (last visited 15 August 2019), online: *WADA*, <[www.wada-ama.org/en/compliance-monitoring-program](http://www.wada-ama.org/en/compliance-monitoring-program)>. There is also an international standard for code compliance by signatories available. See World Anti-Doping Agency, *World Anti-Doping Code International Standard: Code Compliance by Signatories* (Montreal: WADA, April 2018), online: *WADA* <[www.wada-ama.org/sites/default/files/resources/files/isccs\\_april\\_2018\\_0.pdf](http://www.wada-ama.org/sites/default/files/resources/files/isccs_april_2018_0.pdf)>.

but it does allow for some flexibility in how different nations implement and enforce anti-doping.<sup>88</sup> Further, adopting an internationally harmonized anti-doping code accords with Canada’s historical leadership in pushing for a harmonized international system of anti-doping, and demonstrates Canada’s commitment to eliminating doping in sport.<sup>89</sup>

The CCES, as Canada’s NADO and signatory to the WADC, is committed to complying with the WADC. This commitment requires the CCES to:

- adopt and implement anti-doping rules and policies that conform with the WADC;
- cooperate with other NADOs;
- encourage reciprocal testing between NADOs;
- promote anti-doping research;
- withhold funding during eligibility periods;
- “vigorously pursue all potential” anti-doping rule violations within their jurisdiction;
- promote anti-doping education;
- automatically investigate athlete support personnel in the case of anti-doping rule violations by a minor; and
- “cooperate fully with WADA” with respect to WADA investigations.<sup>90</sup>

The fact that Canada, through the CADP, conforms with the WADC does not mean that the government has abdicated—or can abdicate—its stake in anti-doping: there are some commitments required by WADA that the CCES cannot do. Of the above commitments, only the federal government has the power to withhold funding during ineligibility periods. Government funding of the CCES is also what enables the CCES to promote anti-doping research, promote anti-doping education, and undertake investigations.<sup>91</sup>

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<sup>88</sup> E.g., World Anti-Doing Agency, *World Anti-Doping Code International Standards: Testing and Investigations* (Montreal: WADA, January 2017) at “Annex B—Modifications for Athletes with Impairments” at B.4.6 [Annex B].

<sup>89</sup> E.g., Jelinek, House of Commons, Standing Committee on National Health and Welfare (13 May 1987), *supra* note 37 at 1910.

<sup>90</sup> WADC, *supra* note 7 at 20.5.2–20.5.10.

<sup>91</sup> GGFL Chartered Professional Accountants, *Canadian Centre for Ethics in Sport Financial Statements for the Year Ended March 31, 2018* (Ottawa: GGFL, 20 June 2018) at 5, online: CCES, <[www.cces.ca/annual-reports](http://www.cces.ca/annual-reports)> [CCES 2018 Financial Statements]. The CCES received \$6,528,700 from Sport Canada in 2017-19; it self-generated \$1,770,427 through “ethical sport enterprises.”

**Table 2: Roles and Responsibilities in Anti-Doping**

<b>CADP</b>	<b>CPADS-2011</b>	<b>NSOs</b>
Binds members of the Canadian sports community, including NSOs, PSOs, and other organizations who have an anti-doping agreement with the CCES.	Binds federal, provincial and territorial governments to eradicate doping.	Private not-for-profit corporations, substantially funded by Sport Canada.
Administered and written by the CCES.	Endorses the CADP	Responsible for ensuring athletes, coaches, athlete support personnel, etc. agree to comply with the CADP as a condition of membership to the NSO.
Fully complies with the WADC, which is written by WADA.	Recognizes the CCES as Canada’s NADO, responsible for administering the CADP	Recognize the CCES as Canada’s NADO, responsible for administering the CADP.

The WADC also requires NADOs to “be independent in their operational decisions and activities.”<sup>92</sup> Running an anti-doping program in Canada that is fully WADC compliant costs \$6.5 million annually.<sup>93</sup> Following the WADC is not a passive

<sup>92</sup> WADC, *supra* note 7 at 20.5.2.1. The WADC does not explicitly state what NADOs must be independent of, but common sense indicates that they should be independent (institutionally and financially) of the organizations for whom they conduct anti-doping testing and investigations.

<sup>93</sup> GGFL, *supra* note 91 at 5. Barrie Houlihan reports that between 1961 and 1991, the Canadian Government spent \$3.79 million on doping control. See Houlihan 2002, *supra* note 29 at 81. Wolfgang Maennig estimates that the global cost of anti-doping in 2012 exceeded \$228 million. See Wolfgang Maennig, “Inefficiency of the Anti-Doping System: Cost Reduction Proposals” (2014) 49:9 Substance Use and Misuse 1201 at 1201. See also World Anti-Doping Agency, *Costs of Anti-Doping: Report of the WADA Working Group on Anti-Doping Costs* (WADA: The Hague, 2006).

relinquishment of anti-doping policy-making. It still requires active government engagement and support, particularly to implement such obligations as withholding funding to ineligible athletes.<sup>94</sup>

### 3. The Objectives of and Values Advanced by Anti-Doping

The most frequently stated objectives of anti-doping are to preserve clean sport by eliminating cheating and to protect the health of athletes.<sup>95</sup> The earliest justifications for anti-doping measures seemed to have as much to do with protecting the health of athletes as the integrity of sport, rather than emphasizing one more than the other.<sup>96</sup> These objectives articulate how sport, through anti-doping, is used to promote public values like ethical behaviour and a healthy lifestyle. Anti-doping, because of the values it purports to advance, is one example of how governments use sport to carry out policy objectives because it is done in the same way government uses sport to promote objectives such as equality and inclusiveness, or creating national identity. For example, national team athletes are seen as representatives of an ideal Canadian society that is diverse and

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<sup>94</sup> An example of how the government withholds funding to ineligible athletes is through the Athlete Assistance Program, which is discussed in Chapter 3.4.d v.

<sup>95</sup> CADP, *supra* note 1 at 2.2; WADC, *supra* note 7 at pp 11&14; UNESCO Convention, *supra* note 48 at Preamble.

<sup>96</sup> Jan Todd & Daniel Rosenke, “‘The Event that Shook the Whole World Up’: Historicizing the 1983 Pan-American Games Doping Scandal” (2016) 1:2 Intl J History of Sport 164. See also Mary Lou Findlay & Ian Parker, “Canadian Athletes Caught Cheating at 1983 Pan Am Games,” *CBC: The Journal* (24 August 1983), online: *CBC Archives* <[www.cbc.ca/archives/entry/canadian-athletes-caught-in-caracas](http://www.cbc.ca/archives/entry/canadian-athletes-caught-in-caracas)>. In response to Findlay’s question about whether or not the health risks of taking steroids “weighed on his mind at all,” Guy Greavette replies: “As far as I’m concerned, I don’t feel that there is a doctor that knows enough about steroids in Canada [...] there hasn’t been enough study on it. I’m sure that there probably is some bad side effects if you abuse the drug. I don’t feel I have abused it” (at 5:12). See also Bryan E Denham, “*Sports Illustrated*, the ‘War on Drugs,’ and the Anabolic Steroid Control Act of 1990” (1997) 21:3 J Sport & Social Issues 260; Beamish, *supra* note 12 at 225-26. But, more than 30 years after Canada’s first anti-doping policy was released, the emphasis on integrity and ethics (the “spirit of sport”) is markedly more obvious than protecting the health of athletes. A keyword search of “health” in the CADP brings back 6 results, “integrity” 7, “ethics” 5, “fair” more than 10, “true sport” 5, and “spirit of sport” 3.



inclusive.<sup>97</sup> Anti-doping objectives are distinguishable from the public values advanced by anti-doping because the objectives represent specific outcomes that anti-doping measures seek to achieve; public values advanced by anti-doping represent the qualities and principles that motivate governments to take action against doping in sport. The pedestal on which clean sport is placed prioritizes certain objectives and values, and shows how governments take policy actions through investment in sport generally, but particularly so through clean sport.

#### a. The Objectives of the CADP

The stated objective of The Canadian Anti-Doping Program is to “preserve all that is intrinsically valuable about sport,” which is “the essence of Olympism; the pursuit of human excellence through the dedicated perfection of each person’s natural talents.”<sup>98</sup>

The objectives in the CADP were not introduced recently. According to Dubin, the government had two purposes behind its implementation of Canada’s first anti-doping policy (*Drug Use and Doping in Sport: A Sport Canada Policy*) in 1983: “first, to eliminate cheating in those sports that were being funded by the Government of Canada, and, second, of equal if not greater significance, as a response to a concern about the health of those who were using banned drugs or were engaged in other banned practices and procedures.”<sup>99</sup> Further, the 1985 anti-doping policy stated Canada’s intention to

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<sup>97</sup> For example, Canadian Olympic athletes are frequently used as ambassadors to promote inclusivity with respect to issues like sexual orientation. See Canadian Olympic Team, “Competition is difficult enough on its own, let alone when you’re struggling with your identity or worrying about if the people around will accept you for who you are” (17 August 2019), online: *Instagram*, <[www.instagram.com/p/B1RIaPNDKwk/?utm\\_source=ig\\_web\\_copy\\_link](https://www.instagram.com/p/B1RIaPNDKwk/?utm_source=ig_web_copy_link)>. See also Kirsty Duncan, “Sport strengthens confidence, promotes healthy lifestyles and helps build communities. Yesterday’s announcement of nearly \$1M for 2 years to @AboriginalSport helps provide Indigenous youth in Alberta the skills they need to build strong, healthy communities” (13 August 2019 at 10:55), online: *Twitter* <[twitter.com/KirstyDuncanMP/status/1161335587523182592](https://twitter.com/KirstyDuncanMP/status/1161335587523182592)>.

<sup>98</sup> CADP, *supra* note 1 at 2.0.

<sup>99</sup> Sport Canada, 1985 Policy, *supra* note 24.

provide international leadership in the fight against doping in sports and explicitly committed Sport Canada to eradicate the use of performance enhancing drugs.<sup>100</sup> In 1993, the CEO of the CCDS classified anti-doping “primarily as an ethical issue.”<sup>101</sup>

The CADP is “designed to prevent, deter and detect doping in sport.”<sup>102</sup> The CADP notes that Canada’s history in sports “includes a longstanding commitment to fair, ethical and doping-free sport.”<sup>103</sup> The administrator of the CADP, the CCES, is explicitly named in the CADP text and is given the responsibility, “*on behalf of Canadians* [...] to fostering a sporting culture in Canada fully consistent with these values and expectations” (those values and expectations being fair, ethical, and doping-free sport).<sup>104</sup>

Doping, according to the WADC, is contrary to the “spirit of sport.”<sup>105</sup> While protecting and upholding the spirit of sport, and preserving all that is intrinsically valuable about sport seems to be a noble mission, what does it actually mean in practice? Do the self-professed objectives of the CADP live up to their mission when considering their origins? External observations on the objectives behind the CADP (and the WADC) offer alternative views on the actual objectives and challenge the effectiveness of anti-doping policy.<sup>106</sup> For example, protecting the health of athletes may ostensibly be what

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<sup>100</sup> 1985 Policy, *supra* note 24 at 4, as quoted in Beamish, *supra* note 12 at 223.

<sup>101</sup> See House of Commons, Legislative Committee on Bill C-85, an Act Respecting the Control of Psychoactive Substances and their Precursors and to Amend the Criminal Code, the Food and Drugs Act and the Proceeds of Crime (Money Laundering) Act and Repeal the Narcotic Control Act in Consequence Thereof, *Evidence*, 34-3, vol 1, no 1-6 (25 May 1993) at 1630 (p 2:27) (Victor Lachance) at 1630 (p 2:20). He characterizes doping in sport as primarily an ethical issue, but also mentions the need for education and rehabilitation, and balancing those against deterrence and sanctions.

<sup>102</sup> CADP, *supra* note 1 at p 5.

<sup>103</sup> *Ibid* at 1.0.

<sup>104</sup> *Ibid* (emphasis added).

<sup>105</sup> Being contrary to the spirit of sport is, for example, one of three ways substances are added to the Prohibited List. WADC, *supra* note 7 at Art 4.3. The other two ways substances or methods are added to the Prohibited List are if they enhance performance, or if they are harmful to an athlete’s health.

<sup>106</sup> This is different from how objectives are evaluated from the perspective of a *Charter* challenge because here, the commentators are critiquing anti-doping policy from an ethical standpoint. In a *Charter* challenge, the objectives are evaluated on the ends, rather than the means of achieving the objectives. See e.g., *R v*

first prompted anti-doping measures, but it is debatable whether or not doping is worse for athletes' health than the physical harm competing in sport can cause.<sup>107</sup> Ask Vest Christiansen and Rasmus Møller, both professors of sport science at Aarhus University in Denmark, point out: "The health argument against doping has been proven similarly unsound. Medically supervised drug use simply does not seem to have health implications that comes anywhere near the health risks athletes are exposed to by participating in sport."<sup>108</sup> Verner Møller, another professor in the department of public health at Aarhus University, also contends: "to claim that the use of banned performance enhancing drugs is bad for health per se is exaggerated. Most performance enhancing substances are in fact medicines approved for use by sick, weak, and old people so the damage they can do to young well-trained athletes if used responsibly should be negligible."<sup>109</sup>

Just as the argument for anti-doping on the grounds of protecting athletes' health is not bulletproof, so is the justification for anti-doping based on protecting the spirit of sport. Ian Ritchie questions the motives behind emphasizing the "purity of sport" through "the spirit of sport." In his analysis looking at the relationship between anti-doping and

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*Moriarty*, 2015 SCC 55 at paras 26-30, [2015] 3 SCR 485; para 26: "In general, the articulation of the objective should focus on the ends of the legislation rather than on its means, be at an appropriate level of generality and capture the main thrust of the law in precise and succinct terms"; para 30: "We take the legislative objective at face value and as valid."

<sup>107</sup> This is not to suggest that using performance-enhancing drugs is not harmful to athletes' health. See e.g., Andre La Gerche & Maria Brosnan, "Cardiovascular Effects of Performance-Enhancing Drugs" (2017) 135:1 *Circulation* 89.

<sup>108</sup> Ask Vest Christiansen & Rasmus Møller, "Who is More Skilful? Doping and its Implication on the Validity, Morality and Significance of the Sporting Test" (2016) 4 *Performance Enhancement & Health* 123 at 126. See also David Hoff, "Doping, Risk, and Abuse: An Interview Study of Elite Athletes with a History of Steroid Use" (2012) 1:2 *Performance Enhancement & Health* 61.

<sup>109</sup> Verner Møller, "The Road to Hell is Paved with Good Intentions—A Critical Evaluation of WADA's Anti-Doping Campaign" (2016) 4 *Performance Enhancement & Health* 111 at 113. At 115, he argues further: "Rather than protecting health, fairness and equality it [WADA & WADC] increases the health hazards, and contributes to make the playing field even more uneven."

“Olympic mythology,” Ritchie suggests, “the anti-doping movement sought to return sport to its mythical original state.”<sup>110</sup> He notes that there was a shift in the 1960s where a “new ethical stance [on doping] shifted concerns from those of health of athletes to attacks on the morality of athletes’ behaviours”<sup>111</sup> Ritchie and Greg Jackson, both professors at Brock University, argue that anti-doping efforts are imbued with the notion of purity:

The notion of purity is in fact entrenched in WADA’s Code, where sport’s ‘spirit’ is employed as the central justification for antidoping policies [...] we must wonder whether the history of anti-doping is not so much about the long-term, rational and proactive fight against ‘cheats’ and the protection of athletes’ health, but more about reacting politically against sport’s ‘purity’ and, in turn, the protection of the power of the IOC, WADA and organizations, such as those in Canada, that follow their lead.<sup>112</sup>

Ritchie and Jackson argue that using anti-doping as an effort to defend the “purity” (implying power) of organizations like the IOC or WADA is the result of these organizations desiring to maintain their power; they analogize sport to international and national politics, saying these organizations function as if they are “defending their interests in the face of perceived threats to policies.”<sup>113</sup> Paul Dimeo, a professor at the Stirling School of Sport, notes that in the 1960s, the people making decisions on what substances are prohibited were “a core group of

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<sup>110</sup> Ian Ritchie, “Pierre de Coubertin, Doped ‘Amateurs’ and the ‘Spirit of Sport’: The Role of Mythology in Olympic Anti-Doping Policies” (2014) 31:8 Intl J History of Sport 820 at 832. Ritchie analyzes Pierre de Coubertin’s (vision of amateur athletes with respect to how anti-doping policies were intended to keep sport “pure” in the same sense de Coubertin envisioned amateur athletes as “pure” compared to professional athletes. De Coubertin founded the modern Olympics.

<sup>111</sup> Ian Ritchie, “The Construction of a Policy: The World Anti-Doping Code’s ‘Spirit of Sport’ Clause” (2013) 2 Performance Enhancement & Health 194 at 195.

<sup>112</sup> Ritchie & Jackson, *supra* note 66 at 209.

<sup>113</sup> *Ibid.* Ritchie and Jackson give examples of threatening policies as those “involving the use of nuclear power, pesticides, drugs, alcohol and tobacco, and so forth.” See also Emmanuel Macedo, “WADA and Imperialism? A Philosophical Look into Anti-Doping and Athletes as Coloniser and Colonised” (2018) 10:3 Intl J Sport Policy & Politics 415.

Western, male, middle and upper class scientists and administrators who wanted to protect their own power base while utilising vague notions of the essence and ethics of sport.”<sup>114</sup> Dimeo further explains, “many in the upper echelons of world sport wanted to protect the reputation of sport as both a form of healthy physical exercise and a cultural space with specific ethical values.”<sup>115</sup> He suggests that “amateurism,” meaning those athletes who were able to compete in sports without being paid to do so, “played a large part in fomenting anxieties around drugs.”<sup>116</sup>

There are scholars, like Sigmond Loland (from the Norwegian School of Sport Sciences) and Michael McNamee (a professor of sports science at Swansea University), who raise issue with the concept of amateurism and returning sport to its “original state” through anti-doping, saying “asserting an Olympic and amateur view of the intrinsic value of the holistic perfection of natural athletic talent is, however, problematic” because “it seems to resurrect a Victorian notion of the leisured gentleman athlete; a conception of sport that could be called anachronistic and ill-suited to the ethical task of regulating sport in an increasingly commercialised environment.”<sup>117</sup> John Gleaves and Matthew Llewellyn, both kinesiology professors at California State University Fullerton, also note how anti-doping reinforced class differences between amateurs (i.e., well-off gentlemen of leisure) and professionals (i.e., the working class): “Anti-doping rhetoric, and later legislation, first emerged as part of the early twentieth-

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<sup>114</sup> Paul Dimeo, “The Myth of Clean Sport and Its Unintended Consequences” (2016) 4 *Performance Enhancement & Health* 103 at 104.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> Sigmund Loland & Michael McNamee, “The ‘Spirit of Sport,’ WADA’s Code Review, and the Search for Overlapping Consensus” (2019) 11:2 *Intl J Sport Policy & Politics* 325 at 332.

century push to defend amateurism against the perceived nefarious forces of gambling, commercialism, professionalism and totalitarianism that were supposedly overrunning amateur sport.”<sup>118</sup> Gleaves and Llewellyn argue that “the *de facto* class-divide separating working-class professionals and gentleman amateurs allowed professional athletes the freedom to use stimulants free from amateur sport’s ‘moralising’ influence.”<sup>119</sup> They conclude that, “Though no longer seeking to enforce amateurism’s code, the IOC still helps ensure athletes still follow amateurism’s moral tenets by enforcing anti-doping rules in sports.”<sup>120</sup> Likewise, Pietre Bonte, a bioethicist, and his Ghent University colleagues argue that the Olympic ideal of amateurism “was also rooted partly in tendencies to believe that socially constructed classes were in fact hierarchies ordained by God (aristocratic beliefs) and/or Nature (social Darwinist and related beliefs)” and thus helped resolve “a glaring contradiction between the painstaking efforts to ensure fairness for the upperclass [*sic*] men on the sport field with the principled exclusion of the entire lower classes.”<sup>121</sup>

Like its connections to upholding an idealized concept of amateurism and the class divisions that implies, anti-doping also has ties to the “war on drugs” more broadly. For example, Deborah Healey, a law professor at the University of

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<sup>118</sup> John Gleaves & Matthew Llewellyn, “Sport, Drugs and Amateurism: Tracing the Real Cultural Origins of Anti-Doping Rules in International Sport” (2014) 31:8 Intl J History of Sport 839 at 840.

<sup>119</sup> *Ibid* at 842.

<sup>120</sup> *Ibid* at 850. Kathryn Henne also questions what she calls “the moral crusade” behind anti-doping in her book, *Testing for Athlete Citizenship: Regulating Doping and Sex in Sport* (New Brunswick, New Jersey: Rutgers, 2015). In particular, see chapter 2, “Diagnosing Doping: The Institutionalize of the Moral Crusade.”

<sup>121</sup> Pieter Bonte, Sigrid Sterckx & Guido Pennings, “May the Blessed Man Win: A Critique of the Categorical Preference for Natural Talent over Doping as Proper Origins of Athletic Ability” (2014) 39 J Medicine & Philosophy 368 at 372.

New South Wales in Sydney, Australia, asserts, “There appears to be a broader trend towards the use of illicit substances in the community generally, and this has heightened views about the importance of the [World Anti-Doping] Code.”<sup>122</sup> The war on drugs is not restricted to recreational drugs, but clearly has ties to the sporting world, where drug use generally is seen as an evil to be eliminated.<sup>123</sup> Dubin noted the U.S. concern that using steroids could be a gateway to other drug use and was a major focus on the American Hearing on Steroid Abuse; however, Dubin himself did not draw any conclusions with respect to performance enhancing drugs leading to other drug use, recreational or otherwise.<sup>124</sup>

Although the “spirit of sport” seems to be the primary impetus behind anti-doping, it is problematic considering the ideological history behind amateur sport and the war on drugs.<sup>125</sup> Despite its problems, however, the “spirit of sport” still illuminates the fight against doping in sport, and is evident in the public values advanced through anti-doping.

#### b. Public Values Advanced through Anti-Doping

Throughout the history of anti-doping, the public values behind anti-doping have remained relatively unchanged. The public values behind anti-doping, while similar to anti-doping’s objectives, are different because the public values are broader in their scope, advocating an approach to healthy living and ethical behaviour in *all* elements of

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<sup>122</sup> Deborah Healey, “The Myth of the Level Playing Field in Sport” in Ulrich Haas & Deborah Healey, eds, *Doping in Sport at the Law* (Oxford: Hart Publishing, 2015) 3 at 4.

<sup>123</sup> See e.g., Bryan E Denham, *supra* note 96; April D Henning & Paul Dimeo, “The New Front in the War on Doping: Amateur Athletes,” (2017) 51 *Intl J Drug Policy* 128.

<sup>124</sup> Dubin Commission, *supra* note 11 at 127.

<sup>125</sup> The war on drugs is a troubling comparison given its grossly disproportionate effect on racialized communities. See David Koch, Jaewon Lee, & Kyunghee Lee, “Coloring the War on Drugs: Arrest Disparities in Black, Brown, and White” (2016) 8:4 *Race & Social Problems* 313; Doris Marie Provine, “Race and Inequality in the War on Drugs” (2011) 7 *Annual Rev L & Social Science* 41.

day-to-day life, whereas the objectives (ostensibly) are more narrow in their scope and focus on prioritizing the health of athletes' health and the integrity of sport.

Dubin, in the preface to his formal report, acknowledges the effort he put into endeavouring “to define the true values of sport,” restoring the integrity of sport, and honouring “the true objectives of sport.”<sup>126</sup> Beamish notes that Dubin’s effort to do so was “deeply influenced” by Pierre de Coubertin’s theory of Olympic ideals, which are enshrined in the Olympic Charter and include the promotion of physical and moral qualities through sport.<sup>127</sup> While the “spirit,” “interests” or “integrity” of sport is never defined in the CADP, “foundational values” of sport have been listed as “striving for personal best performance and excellence [and] the integrity of competition,”<sup>128</sup> and “celebration of the human spirit, body and mind, and is characterised by values such as ethics, honesty, respect for rules, self-respect and respect for others, fair play and healthy competition”<sup>129</sup> Both Deborah Healey and David Howman, former CEO of WADA, argue that sport without these principles loses its relevance and its “significant cultural importance” and value to society.<sup>130</sup> They contend that sport contaminated by doping does not have the same value to society because it undermines ethical behaviour, ethical competition, and personal excellence.

The CADP itself notes that anti-doping is pursued “through values-based education,” driven by the “True Sport Principles”: go for it, play fair, respect others, keep

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<sup>126</sup> Dubin Commission, *supra* note 12 at xxii-xxiii; see also Beamish, *supra* note 12 at 228.

<sup>127</sup> Beamish, *supra* note 12 at 228-229.

<sup>128</sup> Healey, *supra* note 122 at 3.

<sup>129</sup> David Howman, as cited in Healey, *supra* note 122 at 3.

<sup>130</sup> *Ibid.*



it fun, stay healthy, include everyone, and give back.<sup>131</sup> Sport, through anti-doping, is seen as a means to promote these broad social values that extend beyond the field of play, taking the focus away from competition and broadening it to principles such as inclusivity, fairness, honesty, and respect.<sup>132</sup> Government debates from the 1980s and 1990s, in the lead up to such events as the 1988 Olympic Games in Calgary, the 1994 Commonwealth Games in Victoria, Thunder Bay's bid to host the 1995 Nordic Skiing World Championships, and the parliamentary debate on Bill C-85 (which would have criminalized some performance-enhancing drugs)<sup>133</sup> show that while members of Parliament were not unanimously supportive of investing so much money into sport, there was public value in promoting sport and sport was recognized as a means of achieving outcomes like gender equality, bilingualism, and better health for

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<sup>131</sup> CADP, *supra* note 1 at 1.0. True Sport is a program developed by the CCES; it promotes the values of fairness, excellence, inclusion, and fun through educational programs. See True Sport, "What is True Sport" (last visited 17 September 2019), online: *True Sport* <truesportpur.ca/aboutus>.

<sup>132</sup> Scott Jedlicka discusses the normative discourse of anti-doping, arguing that WADA "masks" the fact that anti-doping rules "are a reflection of the interaction between attitudes towards doping, sport governance structures and power relationships; far from being essential, they are socially constructed and can vary in nature and intensity" by characterizing anti-doping rules as "constitutive of sport." See Scott Jedlicka, "The Normative Discourse of Anti-Doping Policy" (2014) 6:3 *Intl J Sport Policy & Politics* 429 at 437; see also 439: "The normative discourse of sport within anti-doping policy may seem to produce desirable results: an insistence on prohibiting the use of drugs in sport and athletes committed to achieving this end. However, a deeper reading of this discourse reveals an embedded logic in which WADA is a necessary component of sport and athletes are expected not only to abide by rules but also to be happily (and silently) obedient to authority."

<sup>133</sup> Bill C-85, *an Act Respecting the Control of Psychoactive Substances and their Precursors and to Amend the Criminal Code, the Food and Drugs Act and the Proceeds of Crime (Money Laundering) Act and Repeal the Narcotic Control Act in Consequence Thereof*, did not pass because Parliament dissolved and a new government was formed before it passed third reading in the House of Commons. The Bill was intended to introduce stronger controls over "illicit substances," including steroids and other performance-enhancing drugs that fell under the proposed legislation. See generally, House of Commons, *Minutes of Proceeding and Evidence of the Legislative Committee on Bill C-85: Legislative Committee on Bill C-85, An Act respecting the control of psychoactive substances and their precursors and to amend the Criminal Code, the Food and Drugs Act and the Proceeds of Crime (money laundering) Act and repeal the Narcotic Control Act in consequence thereof*, 34-3, vol 1, no 1-6 (11 May 1993, 13 May 1993) (chair: Doug Fee), online: *Canadian Parliamentary Historical Resources*, <parl.canadiana.ca/view/oop.com\_HOC\_3403\_87\_1/1?r=0&s=1>.

Canadians.<sup>134</sup> Sport was seen as a means of obtaining these goals because of its power to unify the country behind a common cause, and because of how Canada's elite athletes were perceived as role models for all Canadians. A good role model, they posited, is not one who uses drugs to enhance their athletic performance.

Anti-doping, according to the CADP is about more than removing cheaters from sport, and actually has a much bigger moral purpose, even if it may be hard to put quantifiable parameters around "all that is intrinsically valuable about sport." The CADP states: "The fight against doping in sport is amply justified in order to protect the interests of sport and the integrity and health of individuals, especially young people."<sup>135</sup> This echoes comments made by then-Minister of State, Fitness and Sport, Jean Chretien, who, when explaining that despite a reduction in Sport Canada's budget, funding for anti-doping was doubling from \$500,000 to \$1 million, said: "The question of the integrity of sport and the values associated with competition are central to the role that sport plays in our nation."<sup>136</sup>

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<sup>134</sup> See e.g., Jelinek, Standing Committee on National Health and Welfare (13 May 1987), *supra* note 37; Lachance, Legislative Committee on Bill C-85, *supra* note 101; House of Commons, Sub-Committee on Fitness and Amateur Sport, *Minutes of Proceeding and Evidence*, 34-3, vol 1, no 1-6 (20 May 1992) at 5A:5, 5A:17 (Pierre Cadiuex), online: Canadian Parliamentary Historical Resources, <parl.canadiana.ca/view/oop.com\_HOC\_3403\_45\_1/1?r=0&s=1>. Jelinek touted the benefits of sport with respect to women, increasing bilingualism, economic benefits, and health through his department's initiatives. Lachance discussed how doping could affect the public value of sport. Cadiuex summed up his remarks with the comment: "I would like to emphasize here the unique and valuable contribution by sport and physical activity to the unity of our nation. They provide the opportunity for Canadians to experience this country's many different cultural traditions and regional distinctions, and they also bring young people together to enjoy healthy competition with their countrymen. It is through these kinds of experiences that a strong sense of Canadian identity is created."

<sup>135</sup> CADP, *supra* note 1 at 2.2.

<sup>136</sup> House of Commons, Standing Committee on Health and Welfare, Social Affairs, Seniors and the Status of Women, *Evidence*, 34-2, vol 1, no 1-31 (14 June 1989) at 1535 (p 5:8) (Jean Chretien), online: *Canadian Parliamentary Historical Resources*, <parl.canadiana.ca/view/oop.com\_HOC\_3402\_54\_1/181?r=0&s=1>.

The CADP states that “Doping-free sport is a matter of great public interest.”<sup>137</sup>

Invoking the importance of doping-free sport as a matter of public interest acknowledges that doping in sport affects more than athletes or other stakeholders in the Canadian sport system, but also affects the general Canadian public. Doping in sport is a matter of great public interest because of the role sport plays in Canadian society. For example, Jean Harvey explains governments see sport as instruments of social cohesion and economic development, use sport as a tool of foreign policy, and envision sport as contributing “to the health and education of individuals and to their participation in society.”<sup>138</sup> This point of view is reflected in the 1998 Mills Report, *Sport in Canada: Everybody’s Business; Leadership, Partnership and Accountability*:

Canada’s amateur and professional sport community has acquired a sense of responsibility and public accountability for the development and delivery of fair and ethical sport. Canadians expect the institution of sport, as broad and diffuse as it may be, to adhere to high moral and ethical standards. From the physical and moral development of our youth to the presentation of our national character on the world stage, sport represents a powerful social, cultural and economic force in our society—a force over which the federal government and sport organizations, amateur and professional, must exercise diligent stewardship to ensure a positive, productive and healthy sport environment for all Canadians.<sup>139</sup>

Barrie Houlihan, emeritus professor of sport policy at Loughborough University, also notes several reasons for government involvement in sport, including: (historically) preserving privileged access to particular sports, addressing public health concerns, using

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<sup>137</sup> CADP, *supra* note 1 at 2.2. See also, See Lachance, *supra* note 101 at 1630 (p 2:27). Lachance was the CEO of the CCDS; he emphasized in this committee meeting that doping in sport was a matter of public interest and the public interest in sport generally could be threatened by doping.

<sup>138</sup> Jean Harvey, “Sport, Politics, and Policy,” in Jane Crossman, ed, *Canadian Sport Sociology*, 2nd ed (Scarborough: Thomson Nelson, 2007) 221 at 227-28.

<sup>139</sup> House of Commons, Standing Committee on Canadian Heritage, Sub-Committee on the Study of Sport in Canada, *Sport in Canada: Everybody’s Business; Leadership, Partnership and Accountability* (December 1998) (Chair: Dennis Mills) at part IV, s 1, online: *Our Commons*, <[www.ourcommons.ca/DocumentViewer/en/36-1/CHER/report-6/page-2](http://www.ourcommons.ca/DocumentViewer/en/36-1/CHER/report-6/page-2)> [Mills Report].

sport as a scheme of social integration, promoting sport as a socially acceptable way to pass time (to avoid youth getting involved in social disruption generally), using sport as a way to increase military preparedness and reflect national prestige, using sport as a tool of international diplomacy (e.g., prohibiting South Africa from participating at events like the Commonwealth Games during Apartheid), as well as viewing sport as being good for economic development.<sup>140</sup> He further points out that moving Sport Canada under Canadian Heritage's umbrella emphasizes the contribution sport makes to Canadian society generally: "The mission of Canadian Heritage is to 'strengthen and celebrate Canada' and within it the mission statement of Sport Canada is to 'strengthen the unique contribution that sport makes to Canadian society, identity and culture.'"<sup>141</sup> Doping-free sport is implicitly part of that contribution.

### c. Sport as a Policy Tool

The public values advanced through anti-doping and the purposes behind the CADP align with Canada's history of using sport as a policy tool.<sup>142</sup> From Canada's first federal legislation focusing on sports, sport has been used by the federal government as a means to promote gender equity, social equity, and bilingualism;<sup>143</sup> to contribute to or shape international relations and national identity; and to help create equity for Indigenous peoples and people with disabilities.<sup>144</sup> For example, hockey is clearly tied to Canadian

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<sup>140</sup> Houlihan 2002, *supra* note 29 at 61-65.

<sup>141</sup> *Ibid* at 83, quoting Sport Canada, *Sport Canada Briefing on Sport Policies and Programs* (Ottawa: Sport Canada, 1996).

<sup>142</sup> Although the focus here is federal sports, this is not to suggest that provincial or municipal governments do not use sports in the same manner to achieve particular non-sport outcomes.

<sup>143</sup> For a discussion on how sport is used to with respect to Canada's official languages, see Graham Fraser, "Official Languages and the Canadian Sport System: Steady Progress, Constant Vigilance Needed" in Lucie Thibault & Jean Harvey, eds, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013) 351.

<sup>144</sup> See generally: Thibault & Harvey, "The Evolution of Federal Sport Policy from 1960 to Today," in Lucie Thibault & Jean Harvey, eds, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013) 11;

national identity and poor showings by Canada in Olympic hockey in the 1950s and 1960s motivated federal involvement in sport.<sup>145</sup> In the late 1970s, the federally funded Territorial Experimental Ski Training Program (which focused on developing cross-country skiers from northern Canada) launched the skiing careers of sisters Shirley and Sharon Firth, who were among the first Indigenous athletes to represent Canada at the Olympics and who remain two of Canada's most-decorated cross-country skiers.<sup>146</sup> Although Canada's first policies directed at sports and recreation focused on using sport as a way to get Canadians active and promote health, since the 1970s, sport-specific policies have also focused on high performance sports and athletes (that is, achieving international success as defined by metrics such as Olympic medals), rather than just the fitness and the health of Canadians generally.<sup>147</sup> These high performance policies, too, serve other ends than simply winning more medals at the Olympics, and aim to achieve objectives such as improving the health of Canadians by inspiring them to participate in sport, not to mention use sport on the international stage to signal Canada's global power.<sup>148</sup> Including anti-doping in federal sports policies shows that there is a role for doping-free sport in terms of health, ethical behaviour, and athletic performance—ideals that reflect well of Canadian culture domestically and abroad.

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Dubin Commission, *supra* note 11 at 52, Macintosh, Bedecki & Franks, *supra* note 18; Jelinek, House of Commons, Standing Committee on National Health and Welfare (13 May 1987), *supra* note 37 at 1915 (p 18:7).

<sup>145</sup> Thibault & Harvey, *ibid* at 12.

<sup>146</sup> See Nordiq Canada, "The Firth Sisters: Northern Lights" (10 January 2011), online: *Cross Country Canada*, <[www.ccski.com/About/History/Our-Olympians/The-Firth-Sisters--Northern-Lights-%281%29.aspx#.XWNmV1ATHUo](http://www.ccski.com/About/History/Our-Olympians/The-Firth-Sisters--Northern-Lights-%281%29.aspx#.XWNmV1ATHUo)>; Nordiq Canada, "The History of TEST" (28 December 2010), online: *Cross Country Canada*, <[www.ccski.com/About/History/Photos-and-Stories/The-History-of-T-E-S-T--\(1\).aspx#.XWNnQ1ATHUo](http://www.ccski.com/About/History/Photos-and-Stories/The-History-of-T-E-S-T--(1).aspx#.XWNnQ1ATHUo)>.

<sup>147</sup> E.g., Dubin Commission, *supra* note 11 at 52-63; Thibault & Harvey, "Evolution of Federal Sport Policy," *supra* note 144 at 14-19; Macintosh, Bedecki & Franks, *supra* note 18 at 158-161.

<sup>148</sup> Jelinek, Standing Committee on National Health and Welfare (13 May 1987), *supra* note 37 at 1915 (p 18:7); Cadieux, Sub-Committee on Fitness and Amateur Sport (20 May 1992), *supra* note 134 at 5A:4-5A5; see also Macintosh, Bedecki & Franks, *supra* note 18 at 154.

Canada's first legislation on sport was the 1961 *Fitness and Amateur Sport Act*, which reflected the government's concerns that Canadians were not active enough, and that was affecting the health and well-being of the nation. At this point in time, government efforts were not distinctly focused on producing international calibre athletes, although Canada's lacklustre results at recent international events certainly was something the government saw as reflecting a lack of fitness generally in Canadians.<sup>149</sup>

By the end of the 1960s, the Canadian government was realizing and increasingly supporting the distinction between "sport" and "fitness."<sup>150</sup> There have been regular government reports, policies, task forces, and committees dedicated to Canadian sport over the last five decades, demonstrating continuous government involvement in sport policy.<sup>151</sup> Sport Canada was founded in 1971 as a distinct entity and following the recommendations of the 1969 task force report.<sup>152</sup> The 1969 Task Force Report on Sport for Canadians was followed by the 1970 Munro Paper, *A Proposed Sports Policy for Canadians*.<sup>153</sup> Other government policies, reports, commissions, and inquiries over the years include the 1981 report, *A Challenge to the Nation: Fitness and Amateur Sport in the '80s*,<sup>154</sup> the 1988 task force report, *Toward 2000: Building Canada's Sport System*,<sup>155</sup> the 1998 Mills Report, *Sport in Canada*,<sup>156</sup> the 2002 *Canadian Sport Policy*,<sup>157</sup> and the

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<sup>149</sup> Thibault & Harvey, "Evolution of Federal Sport Policy," *supra* note 144.

<sup>150</sup> E.g., in the 1969 Task Force Report on Sport Canadians, the authors of the report said, "Sport should not 'be condemned to walk in the shadow of fitness as its retarded [*sic*] brother'" (as cited in the Dubin Commission, *supra* note 11 at 11).

<sup>151</sup> Thibault & Harvey, "Evolution of Federal Sport Policy," *supra* note 144.

<sup>152</sup> Macintosh, Bedecki & Franks, *supra* note 18 at 60.

<sup>153</sup> John Munro, *A Proposed Sports Policy for Canadians* (Ottawa: Department of National Health and Welfare, 1970) [Munro Report].

<sup>154</sup> Gerald Regan, *A Challenge to the Nation: Fitness and Amateur Sport in the '80s* (Ottawa: Minister of State, Fitness and Amateur Sport, 1981).

<sup>155</sup> Government of Canada, *Toward 2000: Building Canada's Sport System* (Ottawa: Government of Canada, 1988).

<sup>156</sup> Mills Report, *supra* note 139.

<sup>157</sup> Government of Canada, *The Canadian Sport Policy* (Ottawa: Canadian Heritage, 2002).

2012 *Canadian Sport Policy*.<sup>158</sup> These policies are in addition to major reports like the *Dubin Commission* and federal-provincial/territorial agreements relating to sport and physical activity.<sup>159</sup> These various reports, task forces, committees, etc., were not individually convened with the same explicit purpose, but common objectives and policy goals are evident. Some focus on high performance athletes, some focus on the general health and physical activity of Canadians, but all of them demonstrate that there is a continuing role for government in sport, and that government can use sport both directly and indirectly to achieve policy outcomes like gender equality, inclusiveness, and national unity. For example, the federal policy, *Actively Engaged: A Policy on Sport for Women and Girls*, envisioned that the Canadian sport system would be improved by having more women participate as athletes, coaches, leaders, which would in turn help create a healthier and more gender equal Canadian society because of the health and leadership benefits arising from involvement in sport.<sup>160</sup>

All of these policies, either implicitly or explicitly, place a high value on ethical sport, which is clearly tied to anti-doping. For example, the *2019 Canadian High Performance Sport Strategy* has a section on sport integrity, which says the desired state for Canada's sport system is "zero tolerance for abuse, harassment, discrimination and

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<sup>158</sup> Government of Canada, *Canadian Sport Policy 2012* (Ottawa: Canadian Heritage, 2012). This policy is intended to guide Canadian sport until 2022.

<sup>159</sup> For a full list of Sport Canada Legislation and Policies between 1985 and 2012, see Thibault & Harvey, "The Evolution of Federal Sport Policy" *supra* note 144 at 12 (Table 1.1). For a full list of Sport-related publications by the government of Canada and other organizations between 1985 and 2012, see Thibault & Harvey, *ibid* at 20-25 (Table 1.3); for a list of Federal-Provincial/Territorial agreements, see Jean Harvey, "Multi-Level Governance and Sport Policy in Canada" in Lucie Thibault & Jean Harvey, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013) 37 at 48 (Table 2.2).

<sup>160</sup> House of Commons, Standing Committee on Canadian Heritage, *Women and Girls in Sport: Report of the Standing Committee on Canadian Heritage* (September 2017) (chair: Hedy Fry), Government of Canada, *Actively Engaged: A Policy on Sport for Women and Girls* (Ottawa: Canadian Heritage, 2009), online: *Canada*, <[www.canada.ca/en/canadian-heritage/services/sport-policies-acts-regulations/policy-actively-engaged-women-girls.html](http://www.canada.ca/en/canadian-heritage/services/sport-policies-acts-regulations/policy-actively-engaged-women-girls.html)>.

doping in sport.”<sup>161</sup> This sits in a list of outcomes next to goals such as “Canadian high performance sport is free of abuse, harassment and discrimination,” and “Canadian high performance sport is fair, safe and inclusive.”<sup>162</sup> Non-performance focused policies, like *Actively Engaged* also include language reflective of ethical or values-based sport, such as defining “quality sport experiences” are those where “individuals are participating in the practice, delivery or organization of technically sound and ethical sport,” and designates the role of the International Sport Directorate as engaging in best practices in areas such as anti-doping.<sup>163</sup>

Although sport has been used as a policy tool to generally promote health, education, and ethical behaviour, it has also been used as a way to demonstrate “national purity.” For example, Ritchie and Jackson argue that both doping and anti-doping efforts were connected to creating positive national images:

Doping itself, in the east and west, was, if not state sanctioned, then tacitly accepted by sport administrators hoping to promote positive national imagery on the international stage. Furthermore, anti-doping initiatives, both internationally and in Canada, have been established by organizations intent on maintaining an image of ‘national purity’ with nations’ respective athletes untarnished by the use of drugs.<sup>164</sup>

Sport, through anti-doping and other programs, has an ideological function that positions it (through an active lifestyle, and through fair and honest competition) as a solution to “national impurity” by addressing issues like poor ethics, bad health, and social inequality alike.<sup>165</sup> Anti-doping is a way to signal government

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<sup>161</sup> Government of Canada, *2019 Canadian High Performance Sport Strategy* (Ottawa: Canadian Heritage, 2019) at 17.

<sup>162</sup> *Ibid* at 17, SI2, SI3.

<sup>163</sup> *Actively Engaged*, *supra* note 160.

<sup>164</sup> Ritchie & Jackson, *supra* note 66 at 209.

<sup>165</sup> The argument of sport being a way to correct “national impurity” has negative implications, particularly with respect to race. An obvious example of this would be the so-called Nazi Olympics, hosted in 1936 by Germany. See e.g., Laurel Burkel, *Cups, Cowbells, Medals and, Flags: Sport and National Identity in*



intention to use sport as the means to address ethical issues both nationally and internationally.

The federal government shows its support for sport through hosting major events as well. For example, hundreds of millions of dollars have been given by government to support for events like the 1976 Olympic Games in Montreal, the 1988 Olympic Games in Calgary and the 2010 Olympic Games in Vancouver,<sup>166</sup> as well as the Commonwealth Games in 1978 (Edmonton) and 1994 (Victoria),<sup>167</sup> the Pan Am Games in 1999 (Winnipeg) and 2015 (Toronto),<sup>168</sup> and events like the FIFA World Cup in 2015 and 2026.<sup>169</sup> Support for major events has been reinforced through other government programs, like Own the Podium, which focus on achieving top results at international events.<sup>170</sup> These events are viewed as having beneficial effects such as boosting tourism,

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*Germany, 1936-2006* (Thesis: Naval Postgraduate School, 2006) [unpublished]. However, 21st century Canadian sport ideology pushes back against that ideology, promoting diversity on the Canadian Olympic team and celebrating athletes who have immigrated to Canada as Canadian success stories. See e.g., Meagan Campbell, “‘I Had a Dream to Wrestle Like the Canadians’: Daniel Igali on Winning Gold—and Finding Family—in Canada,” *Maclean’s* (29 June 2014), online: *Maclean’s*, <[www.macleans.ca/news/canada/daniel-igali-had-a-dream-to-wrestle-like-a-canadian/](http://www.macleans.ca/news/canada/daniel-igali-had-a-dream-to-wrestle-like-a-canadian/)>.

<sup>166</sup> The federal government provided \$537 million for the 1976 Olympics in Montreal and \$224,848,000 for the 1988 Olympics in Calgary. See Houlihan 2002, *supra* note 29 at 81. For the 2010 Olympics in Vancouver, the federal government contributed \$74.4 million and the B.C. government \$113.4 million, although these figures do not include the cost of major infrastructure improvements (like the Sea to Sky Highway), which were done for the Olympics. See “Vancouver 2010 Winter Olympic Debt-Free VANOC Final Report Says,” *The Canadian Press* (3 July 2014), online: *CBC*, <[www.cbc.ca/news/canada/british-columbia/vancouver-2010-winter-olympics-debt-free-vanoc-final-report-says-1.2695994](http://www.cbc.ca/news/canada/british-columbia/vancouver-2010-winter-olympics-debt-free-vanoc-final-report-says-1.2695994)>.

<sup>167</sup> Canada also hosted the inaugural Commonwealth Games in 1930 (Hamilton) and the 1954 Commonwealth Games (Vancouver).

<sup>168</sup> Winnipeg also hosted the 1967 Pan Am Games.

<sup>169</sup> Canada is co-hosting the FIFA men’s World Cup in 2026 with the U.S. and Mexico. The federal government is providing up to \$4.3 million to help prepare for the event. See Canada Soccer, news release, “Government of Canada Announces Funding to Canada Soccer for the 2026 FIFA World Cup™” (23 May 2019), online: *Canada Soccer* <[www.canadasoccer.com/government-of-canada-announces-funding-to-canada-soccer-for-the-2026-fifa-world-cup-in-canada-mexico-and-the-united-states-p162192](http://www.canadasoccer.com/government-of-canada-announces-funding-to-canada-soccer-for-the-2026-fifa-world-cup-in-canada-mexico-and-the-united-states-p162192)>.

<sup>170</sup> Own the Podium was founded in 2005; its objective was to improve Canada’s performance at the 2010 Olympics. When it was formed, OTP was funded by a combination of stakeholders, including Sport Canada, the Canadian Olympic Committee, the 2010 Olympic Games organizing committee, and corporate sponsorship. Sport Canada contributes the most to OTP. See Own the Podium, “About OTP” (last visited 16 August 2019), online: *Own the Podium*, <[www.ownthepodium.org/About-OTP](http://www.ownthepodium.org/About-OTP)>.

the economy, and increasing sport participation generally.<sup>171</sup> Major events, like the FIFA World Cup or the Olympics, fall under the *Federal Policy for Hosting International Events*.<sup>172</sup> One of the minimum requirements of the Hosting Policy is that the CADP must be respected.<sup>173</sup>

It is clear that the government, at both the federal and provincial/territorial levels, sees sport as an important component of Canadian society and something that contributes to the well-being of Canadians in myriad ways. The Canadian government continues to invest heavily in sport. In 1985-86, Sport Canada provided more than \$58 million to sport; in 2019-20, the federal government plans to spend more than \$230 million.<sup>174</sup> The government continues to use sport as a policy tool to achieve results other than those resulting from athletic competition itself.<sup>175</sup> These include results such as national

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<sup>171</sup> For a broad discussion and history of Canada's hosting policies, see Cora McCloy & Lucie Thibault, "Hosting Policies of Sport Events" in Lucie Thibault & Jean Harvey, eds, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013) 243.

<sup>172</sup> Government of Canada, *Federal Policy for Hosting International Events* (Effective 1 January 2008, last modified 31 October 2017) (Ottawa: Government of Canada, 2008), online: *Canada*, <[www.canada.ca/en/canadian-heritage/services/sport-policies-acts-regulations/policy-hosting-international-sport-events.html](http://www.canada.ca/en/canadian-heritage/services/sport-policies-acts-regulations/policy-hosting-international-sport-events.html)>.

<sup>173</sup> Hosting Policy, *ibid* at s 6. Note, in this policy, the CADP is described as a federal policy.

<sup>174</sup> Thibault & Harvey, "Evolution of Federal Sport Policy," *supra* note 144 at 28 (Table 1.4), which shows Sport Canada funding increasing from \$28 million in 1985-86 to nearly \$211 million in 2012-13. For current amounts, see Government of Canada, *Departmental Plan 2019-20—Canadian Heritage* (Ottawa: Canadian Heritage, 2019) at 19, online: *Canada*, <[www.canada.ca/en/canadian-heritage/corporate/publications/plans-reports/departmental-plan-2019-2020.html](http://www.canada.ca/en/canadian-heritage/corporate/publications/plans-reports/departmental-plan-2019-2020.html)>.

<sup>175</sup> E.g., Budget 2019 includes the following commitments with respect to sports and Indigenous peoples:

- \$18.9 million over five years, starting in 2017-18, and ongoing funding of \$5.5 million every four years thereafter to support sports programming
- \$47.5 million over five years, and \$9.5 million per year ongoing, starting in 2018-19, to support provincial and territorial Indigenous sport organizations
- \$30 million over three years, starting in 2018-19, in support of efforts to move towards gender parity in the Canadian Sport System
- \$25 million over five years, starting in 2018-19 for ParticipACTION
- Budget 2019 proposes to invest \$30 million over five years, starting in 2019-20, with \$6 million per year ongoing, to enable Canadian sports organizations to promote accessible, ethical, equitable and safe sports.

See Government of Canada, *Investing in Young Canadians: Budget 2019* (Ottawa: Department of Finance, 2019) at 22, 25, online: *Canada*, <[www.budget.gc.ca/2019/docs/youth-jeunes/youth-jeunes-en.html](http://www.budget.gc.ca/2019/docs/youth-jeunes/youth-jeunes-en.html)>.

unity,<sup>176</sup> international leadership,<sup>177</sup> and gender equity.<sup>178</sup> The Canadian government has historically been and continues to be a major actor in sport in Canada.

#### 4. The CADP in Operation

There are several elements as to how the CADP operates in practice. These elements include authorship of the CADP, adoption of the CADP, who is bound by the CADP and how, as well as the standards and procedures of the CADP.

##### a. Who Writes the CADP

Officially, the CCES is the author of the CADP, although several of the anti-doping rules in the CADP are effectively written by the World Anti-Doping Agency. The CCES is obligated to follow the rules of the WADC as a signatory of the WADC and as Canada's NADO.<sup>179</sup> Canada is committed to implementing the WADC domestically by virtue of Canada's UNSECO Convention obligations. The 20 rules of the CADP are substantially the same as articles 2 through 20 of the WADC, as required by the WADC.<sup>180</sup> WADA also writes the international standards for prohibited substances and methods, testing and

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<sup>176</sup> See e.g., Cadieux, Sub-Committee on Fitness and Amateur Sport (5 May 1992), *supra* note 134 at 5A:17: "I would like to emphasize here the unique and valuable contribution by sport and physical activities to the unity of our nation. They provide the opportunity for Canadians to experience this country's many different cultural traditions and regional distinctions, and they also bring young people together to enjoy healthy competition with their countrymen. It is through these kinds of experiences that a strong sense of Canadian identity is created." The move of Sport Canada to the Department of Canadian Heritage is also seen as indicative of the role sport plays in promoting national unity and identity. See also, Harvey, *supra* note 159 at 45.

<sup>177</sup> See e.g., Cadieux, Sub-Committee on Fitness and Amateur Sport (5 May 1992), *supra* note 134 at 5A:5. Here Cadieux points to initiatives like Sport for Native Groups and Sport for Athletes with Disabilities as examples where the government took action to "to improve the quality and the quantity of opportunities available to Canadians to participate in sport." He also lauds the success of Fitweek and PartipACTION, as well as highlighting Canada's efforts and international leadership in anti-doping (see 5A:13).

<sup>178</sup> Government of Canada, *Actively Engaged*, *supra* note 160 at Appendix 1.

<sup>179</sup> WADA, "Code Signatories," *supra* note 41.

<sup>180</sup> WADC, *supra* note 7 at 23.2.2 (which lists Arts 1, 2, 3, 4.2.2, 4.3.3, 7.11, 9, 10, 11, 13 (except 13.2.2, 13.6, 13.7), 15.1, 17, 24, Appendix 1).

investigations, laboratories, therapeutic use exemptions, protection of privacy and personal information, and code compliance, all of which the CADP follows.

The WADC “was never designed to be a document that stood still.”<sup>181</sup>

Consultations to update the WADC involve “the whole anti-doping community” and take two to three years to complete.<sup>182</sup> While WADA may be the official author of the WADC, and thus the author of much of the CADP through the CCES’s obligation (as Canada’s NADO) to follow the WADC, Canada has input into the code through WADA’s consultation process. Canadian input comes via stakeholders like the CCES, lawyers who represent athletes, academics, the Canadian Olympic Committee, and AthletesCAN.<sup>183</sup>

#### b. Who Adopts the CADP

The federal government adopts and endorses the CADP through various programs and policies, which are discussed in detail in the next Chapter. These include the *Canadian Policy Against Doping in Sport—2011*, the UNSECO Convention against Doping in Sport, and programs like the Athlete Assistance Program and the Sport Support Program. The focus of this section is how sport organizations are bound to comply with the CADP.

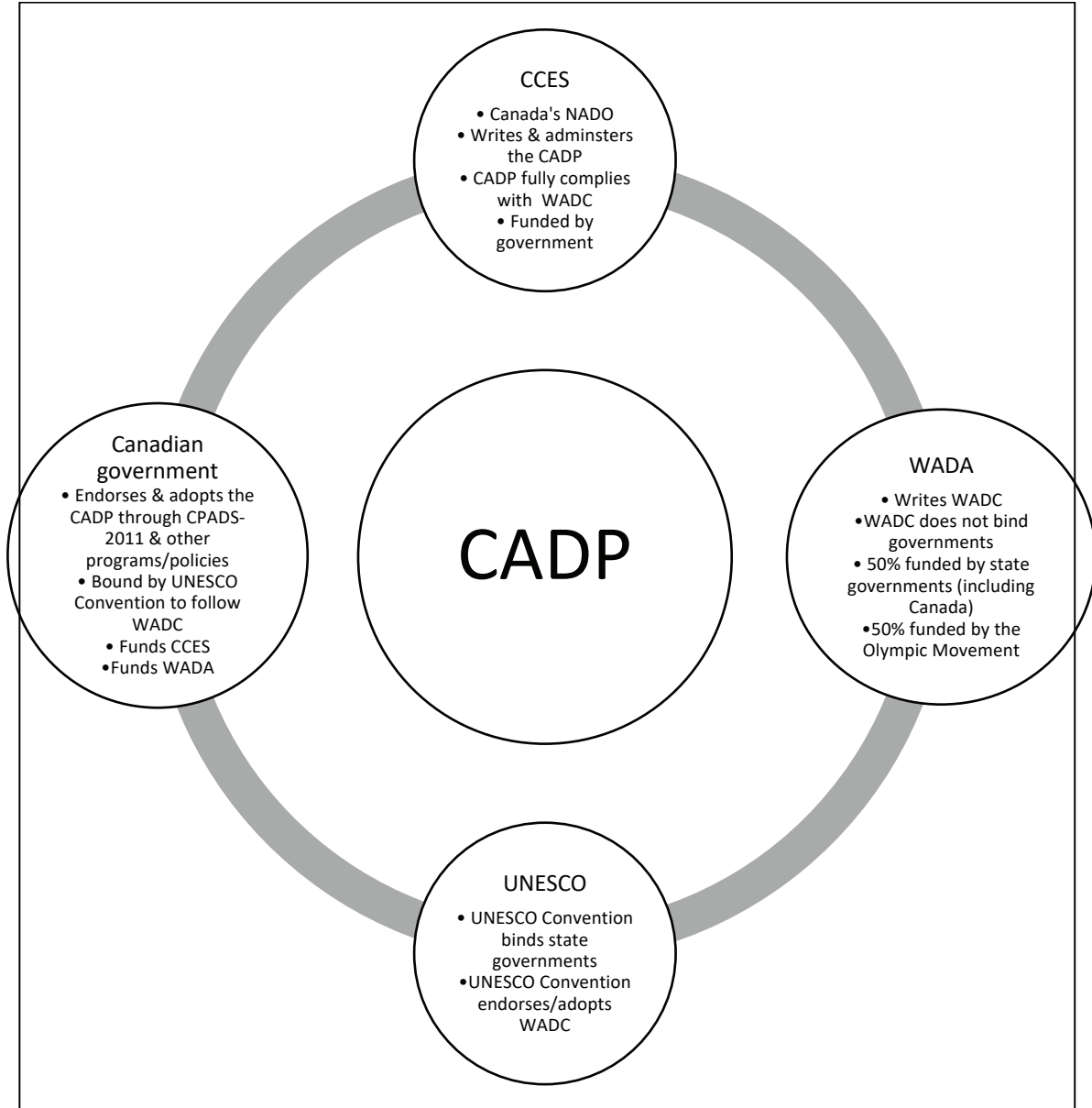
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<sup>181</sup> World Anti-Doping Agency, “The Code” (last visited 16 August 2019), online: *WADA* <[www.wada-ama.org/en/what-we-do/the-code](http://www.wada-ama.org/en/what-we-do/the-code)>.

<sup>182</sup> *Ibid.* The review of the WADC for the 2021 Code started in November 2017; the draft version of the code is expected to be presented in November 2019, and the revised code will take effect on January 1, 2021. See World Anti-Doping Agency, “2021 Code Review” (last visited 16 August 2019), online: *WADA*, <[www.wada-ama.org/en/what-we-do/the-code/2021-code-review](http://www.wada-ama.org/en/what-we-do/the-code/2021-code-review)>.

<sup>183</sup> The following individuals gave feedback to WADA for the 2021 WADC review: Elizabeth Carson gave feedback in her role as manager of sport services for the CCES; Michael Nguyen and Josh Vander Vies gave feedback from their perspectives as lawyers representing athletes facing ADRVs; Bertrand Stoffel a post-doctoral fellow at McGill provided feedback from his perspective as a researcher; Robert McCormack gave feedback on behalf of the Canadian Olympic Committee; Ashley LaBrie, executive director of AthletesCAN provided submissions on behalf of athletes. See World Anti-Doping Agency, “2021 Code Review—First Consultation: Questions to Discuss and Consider” (last modified 4 June 2018), online: *WADA*, <[www.wada-ama.org/sites/default/files/2018\\_06\\_04\\_stakeholdercomments.pdf](http://www.wada-ama.org/sites/default/files/2018_06_04_stakeholdercomments.pdf)>.

**Figure 1: Stakeholders Involved in the CADP**



The CADP is adopted by sport organizations through an adoption contract between the sport organization and the CCES. Adoption entails incorporating the CADP into the organization's internal rules and entering into a written contract that details the mutual roles and obligations of the CCES and the adopting organization.<sup>184</sup> The CADP

<sup>184</sup> CADP, *supra* note 1 at p 10 (summary). Minimum requirements for the contract are outlined at 5.3.

adoption contract binds members of the sport organization—including but not limited to athletes, coaches, and athlete support personnel—because individuals are bound through their membership agreement with the sport organization (consenting to the CADP is a condition of membership). Obligations are imposed on athletes and athlete support personnel, in addition to the sport organization and the CCES.

### c. Who is Bound by the CADP (and How)

When sport organizations adopt the CADP, they must deliver anti-doping education, assist with doping control, develop and implement doping control measures, and report any information suggesting anti-doping rule violations.<sup>185</sup> The CCES, in return, administers the CADP for the organization, monitors the sport organization’s compliance with the adoption contract, and provides annual reports to sport organizations and the government regarding implementation of the CADP.<sup>186</sup>

There are a limited number of ways individuals fall under the CADP and consent to its authority and application. According to the CADP, all “stakeholders, athletes, athlete support personnel and other persons accept the CADP as a condition of participating in sport and shall be bound by the rules contained in the [World Anti-Doping] Code and the CADP.”<sup>187</sup> The CADP binds sport organizations and individuals through “the relationship which exists between each adopting sport organization and its members, registrants or participants through those individuals’ express or implied agreement to participate in sport according to its rules.”<sup>188</sup> Elite athletes, particularly those who receive funding from Sport Canada, are obligated to follow the CADP as part

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<sup>185</sup> *Ibid* at 6.4.

<sup>186</sup> *Ibid* at 6.5.

<sup>187</sup> *Ibid* at 4.1.

<sup>188</sup> *Ibid* at 4.3.

of their funding agreement with Sport Canada.<sup>189</sup> This requirement is imposed on athletes through both Sport Canada and their NSO, and is a distinct clause in their contract with Sport Canada.<sup>190</sup> University athletes are bound to the CADP through an annual student-athlete acknowledgement and consent form.<sup>191</sup>

Recreational athletes may also be bound by the CADP.<sup>192</sup> This could happen by purchasing a membership in a provincial sport organization so they can participate in provincial events without having to pay an additional amount.<sup>193</sup> For example, in Nova Scotia, anyone who wishes to purchase a racing licence through Bicycle Nova Scotia has to sign a declaration agreeing to submit to a drug test if they compete in an event “where a drug test is conducted under the UCI [Union Cycliste Internationale] Drug Test Regulations and the CCES regulations.”<sup>194</sup> The declaration also notes that the cyclist agrees the results of their drug tests may be made public, and that they will submit to the jurisdiction of the CAS and accept the CAS decision as final.<sup>195</sup>

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<sup>189</sup> Canadian Heritage, *Sport Canada Athlete Assistance Program Policies and Procedures*. (Ottawa: Public Works and Government Services Canada, 2015). The Athlete Assistance Program is a federal funding program for national level athletes. It is discussed further in Chapter 3.4.d.v.

<sup>190</sup> *Ibid* at ss 7.1, 11.1, 12.

<sup>191</sup> U SPORTS, “Policies and Procedures 90—Conduct and Enforcement: U SPORTS Anti-Doping Policy (Drug Education and Doping Control)” (August 2018) at clause 90.10.3.3.2, online: *U Sports*, <[usports.ca/uploads/hq/By\\_Laws-Policies-Procedures/2018/EN/Policy\\_90.10\\_Drug\\_Education\\_%282018-2019%29.pdf](https://usports.ca/uploads/hq/By_Laws-Policies-Procedures/2018/EN/Policy_90.10_Drug_Education_%282018-2019%29.pdf)>.

<sup>192</sup> By recreational, I mean athletes who are not professional or full-time athletes, but athletes who may compete at all levels of events from local races to national events. These individuals might compete at a high level, but are not federally or otherwise funded, so are not bound through agreements like the AAP.

<sup>193</sup> Membership generally allows individuals to do multiple events without paying an additional fee (which is usually for insurance) at each event.

<sup>194</sup> Bicycle Nova Scotia, “Declaration” (last visited 16 August 2019) at clause 6, online: *Zone4*, <[zone4.ca/register.asp?id=19683&lan=1&cartlevel=0&addfamily=>](https://zone4.ca/register.asp?id=19683&lan=1&cartlevel=0&addfamily=>)>. Note: the declaration is on page 2 of the registration process, after personal details have been filled, but before registration is submitted.

<sup>195</sup> *Ibid* at Clauses 6 and 7. The publicization of drug test results is discussed in Chapter 4.5.d. Bicycle Nova Scotia is a bit of an anomaly compared to other sport organizations because athletes also specifically concede to what the UCI, the international federation for cycling requires. Other provincial organizations, for example Athletics Nova Scotia and Athletics BC follow the phrasing from Athletics Canada without reference to the international federation.

Likewise for runners, anyone who joins Athletics Nova Scotia must agree to the CADP before they can complete their membership registration.<sup>196</sup> Non-members who register for a major event that is sanctioned by Athletics Canada, which includes events like the Royal Victoria Marathon or the Ottawa Marathon, are not required to consent to anti-doping unless they race in the elite category, or if they are an individual who has purchased a membership to Athletics Canada. Generally, consenting to anti-doping is not done at the level of individual events, unless the event is a major event like the Olympic Games.<sup>197</sup>

Although some athletes may consent to anti-doping without reading the anti-doping waiver or the CADP, or completing anti-doping training, ignorance is not a defence for anti-doping rule violations. Not only is there case law that upholds the validity of waivers despite people not reading the waiver,<sup>198</sup> anti-doping decisions have also upheld anti-doping clauses as binding individuals even when they claimed they were unaware of them. In *Doucette*, Arbitrator Stitt rejected Doucette's argument that he should not be bound by the CADP because he did not read the online declaration prior to buying his racing licence and was therefore not only unaware that he may have to submit to drug testing, but also did not consent to anti-doping. Stitt ruled: "an athlete is not

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<sup>196</sup> The membership waiver for "unattached members" (that is, those who are not affiliated with an official club) reads, "I have read, understood and agree to the Canadian Anti-Doping Program (CADP)." See Athletics Nova Scotia, "Unattached Nova Scotia: Add Members" (list visited 16 August 2019), online: *Trackie*, <[www.trackie.com/members/UN-NS.php](http://www.trackie.com/members/UN-NS.php)>. This waiver is the same as the one BC Athletics uses, and links to the same information about the CADP.

<sup>197</sup> E.g., International Olympic Committee, *Olympic Charter* (in force from 26 June 2019) (Lausanne: IOC) at Rule 40: "To participate in the Olympic Games a competitor, team official or other team personnel must respect and comply with the Olympic Charter and World Anti-Doping Code, including the conditions of participation established by the IOC." The *Olympic Charter* is effectively the rules and by-laws of the IOC and Olympic games.

<sup>198</sup> E.g., *Jamieson v Whistler Mountain Resort Limited Partnership*, 2017 BCSC 1001, 2017 BCSC 1001 (CanLII); see also Matt Robinson, "Far-Reaching Sports Waivers under Scrutiny after Court Decision," *Vancouver Sun* (19 June 2017), online: *Vancouver Sun*, <[vancouver.sun.com/news/local-news/far-reaching-waivers-under-scrutiny-after-court-decision](http://vancouver.sun.com/news/local-news/far-reaching-waivers-under-scrutiny-after-court-decision)>.



entitled to rely on either the CCES or a sport organization that adopts the CADP to inform the athlete that the athlete may be tested. The athlete has a positive obligation to inform himself.”<sup>199</sup>

At the most basic level, individuals and organizations are bound to follow the CADP by an agreement that functions like a contract. Organizations have an agreement with the CCES that imposes obligations on each party, and individuals have agreements with sport organizations that also impose obligations on each party as a condition of participation.

#### d. Who Administers the CADP

While the main administrator of the CADP is the CCES, there are other actors involved who also administer aspects of the CADP. The Sport Dispute Resolution Centre of Canada (SDRCC) is responsible for adjudicating anti-doping disputes (i.e., those arising from an anti-doping rule violation). The Court of Arbitration for Sport (CAS) is responsible for hearing any doping appeals, or first-instance doping hearings for international athletes or international events.

#### i. The CCES

The CCES is Canada’s NADO and as such, is the official administrator of the CADP.<sup>200</sup>

The CADP says, “All sport organizations adopting the CADP and the individuals

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<sup>199</sup> SDRCC DT 18-0294 *Canadian Centre for Ethics in Sport v Greg Doucette*, (2018) Sport Dispute Resolution Centre of Canada (Arbitrator Allan Stitt) at para 56, online: *SDRCC*, <[www.crdsc-sdrcc.ca/resource\\_centre/pdf/English/879\\_SDRCC%20DT%2018-0294.pdf](http://www.crdsc-sdrcc.ca/resource_centre/pdf/English/879_SDRCC%20DT%2018-0294.pdf)> [*Doucette*].

<sup>200</sup> The CCES is recognized by WADA as Canada’s NADO because the CCES is Canada’s signatory to the WADC. The CCES is recognized in Canada as Canada’s NADO within the sport community. According to Jeremy Luke, the senior director of sport integrity at the CCES “simply has been recognized within the sport community as the organization to provide this service [anti-doping]. CCES enters into contracts with each Canadian sport organization funded by Sport Canada to perform this service. Sport Canada funds CCES in large part to do so. There is nothing preventing some other organization from being created or assuming this responsibility on behalf of the sport community.” Email from Jeremy Luke to Kate Scallion (18 September 2019). When I asked WADA how it designates entities as NADOs, I received this response:

described above delegate to the CCES the authority and responsibility for administering the CADP.”<sup>201</sup> The CCES asserts its “authority to act pursuant to the CADP is conferred by the Canadian Sport Community, the [World Anti-Doping] Code and the International Standards, and it is documented in the *Canadian Policy Against Doping in Sport (2011)*.”<sup>202</sup>

CCES’s obligations in administering the CADP include the duty to:

- Cooperate with stakeholders and governments to promote anti-doping research;
- Plan, coordinate, implement, and advocate doping control improvements;
- Cooperate with “other relevant national organizations, agencies, and other anti-doping organizations”;
- Encourage reciprocal testing between NADOs;
- Plan, implement, and monitor anti-doping information, education, and prevention programs;
- “Vigorously pursue” all potential anti-doping rule violations within its jurisdiction;
- Automatically investigate athlete support personnel in the case of any anti-doping rule violations by minors or support personnel who have provided support to more than one athlete who has been found to have committed an anti-doping rule violation;
- Cooperate fully with WADA in connection with WADA investigations.<sup>203</sup>

### *Drug Testing*

In addition to the above obligations, the CCES conducts drug testing. This includes collecting urine or blood samples from athletes both in and out of competition. Athletes may be chosen for in-competition testing based on their finish position, by random selection, or by targeted testing (e.g., if that person is suspected of doping). Out-of-competition testing may happen at the athlete’s home, a training camp, or other locations;

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“WADA receives a high volume of requests from various stakeholders around the world on a daily basis. Therefore, we are currently not in a position to answer specific student requests.” Email from WADA to Kate Scallion (26 August 2019).

<sup>201</sup> CADP, *supra* note 1 at 4.3.

<sup>202</sup> *Ibid* at 4.1. The Code referred to is the WADC. See also CPADS-2011, *supra* note 4.

<sup>203</sup> CADP, *supra* note 1 at 6.5.4-6.5.11.

only athletes in the registered testing pool are subject to unannounced out-of-competition testing.<sup>204</sup>

Athletes are notified by a doping control officer that they need to submit a test sample. Doping control personnel must wear identification indicating they are authorized to take test samples.<sup>205</sup> Athletes are informed of their rights and responsibilities, and sign a release form prior to testing.<sup>206</sup> Once athletes have signed the release, they are chaperoned continuously by a doping control officer until their sample has been collected.

When athletes are selected for drug testing, they are taken to the doping control station, where they are asked to choose a sample collection vessel and verify that the codes on the bottles match.<sup>207</sup> For urine samples, the athlete is responsible for dividing the sample into the A and B collection bottles; blood samples are divided into A and B samples by the blood collection officer.<sup>208</sup> When an athlete gives a sample, they are also asked to declare if they are on any medications, supplements, etc.<sup>209</sup> Athletes review all the paperwork to ensure its accuracy prior to its filing; they also have the opportunity to record comments on the doping control form, and are given copies of the form.<sup>210</sup>

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<sup>204</sup> Canadian Centre for Ethics in Sport, “Sample Collection Procedures” (last visited 16 August 2019), online: *CCES*, <[www.cces.ca/sample-collection-procedures](http://www.cces.ca/sample-collection-procedures)>.

<sup>205</sup> *Ibid*; World Anti-Doping Agency, *Sample Collection Personnel: Recruitment, Training, Accreditation and Re-Accreditation Guidelines* (Montreal: WADA, October 2014), online: *WADA*, <[www.wada-ama.org/en/resources/world-anti-doping-program/guidelines-sample-collection-personel](http://www.wada-ama.org/en/resources/world-anti-doping-program/guidelines-sample-collection-personel)>.

<sup>206</sup> *CCES*, “Sample Collection Procedures,” *supra* note 204; Canadian Centre for Ethics in Sport, “Athletes’ Rights and Responsibilities” (last visited 16 August 2019), online: *CCES*, <[cces.ca/athletes-rights-and-responsibilities](http://cces.ca/athletes-rights-and-responsibilities)>.

<sup>207</sup> Athletes choose their own collection vessel for both urine and blood tests. *CCES*, “Sample Collection Procedures,” *supra* note 204. The *CCES* uses the collection vessels required by *WADA*.

<sup>208</sup> *Ibid*

<sup>209</sup> *Ibid*.

<sup>210</sup> *Ibid*.

Samples are sent to an accredited lab for testing.<sup>211</sup> The A sample is analyzed and the B sample is stored. Athletes in the registered testing pool can be notified online of their test results within a few weeks of sample collection; athletes not in the testing pool are notified only if their sample results in an adverse analytical finding.<sup>212</sup> If the test results in an anti-doping rule violation, athletes are notified within three to four weeks of the sample collection.<sup>213</sup>

Adverse analytical findings in a sample trigger an investigation where the CCES establishes whether or not there is a valid therapeutic use exemption for the substance, and whether or not the testing and analysis followed proper procedures. If there is a valid TUE or proper procedures were not followed, there is no anti-doping rule violation.

Once an athlete is notified of an adverse analytical finding in their sample, they may request that their B sample be tested. If the B sample does not verify the A sample, there is no anti-doping rule violation.

When an anti-doping rule violation has been established, the athlete, the sport organization, and the federal government are notified. A mandatory provisional sanction is imposed, and the anti-doping rule violation may be publicized on the CCES website.<sup>214</sup>

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<sup>211</sup> WADA accredits all laboratories that may be used to analyze athletes' samples; the only WADA-accredited lab in Canada is in Montreal. See World Anti-Doping Agency, "Accredited Laboratories" (last visited 17 September 2019), online: *WADA*, <[www.wada-ama.org/en/what-we-do/science-medical/laboratories/accredited-laboratories](http://www.wada-ama.org/en/what-we-do/science-medical/laboratories/accredited-laboratories)>. See also World Anti-Doping Agency, *World Anti-Doping Code International Standard: Laboratories* (Montreal: WADA, November 2019).

<sup>212</sup> CCES, "Sample Collection Procedures," *supra* note 204 Non-RTP athletes are contacted by the means indicated on their release form.

<sup>213</sup> *Ibid.*

<sup>214</sup> CADP, *supra* note 1 at 14.3. Public disclosure of provisional suspensions is discretionary. A recent example of a provisional suspension that was not immediately disclosed publicly is the case of Australian swimmer Shayna Jack. The non-disclosure in this case was perhaps a bigger issue than it would have been otherwise due to the actions of another Australian swimmer, Mack Horton, who refused to stand on the podium with Chinese swimmer Sun Yang at the Fédération Internationale de Natation (FINA) World Championships; Mack was protesting Yang's participation given he had a forthcoming anti-doping hearing at the CAS and has previously served anti-doping suspensions. See e.g., Dennis Passa, "Swimming Australia's Glass House Comes Crashing Down with Positive Doping Samples," *The Associated Press* (30

If the individual does not waive their right to a hearing, the anti-doping tribunal (see SDRCC, below) convenes a hearing within 45 days of the individual's notification.<sup>215</sup> A reasoned decision is released within 20 days of the hearing and also published on the CCES website.<sup>216</sup> Appeals are available and must be filed within 21 days of receiving the decision.<sup>217</sup>

## ii. The SDRCC

The Sport Dispute Resolution Centre of Canada (SDRCC) is Canada's national dispute resolution body for sports. It was founded in 2004 under the *Physical Activity and Sport Act*.<sup>218</sup> It provides services such as mediation and arbitration for national-level athletes and national sport organizations. The SDRCC adjudicates disputes on issues such as team selection and funding as well as anti-doping. The SDRCC maintains a public list of

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July 2019), online: *CBC*, <[www.cbc.ca/sports/olympics/aquatics/australia-swimming-positive-doping-sample-1.5230017](http://www.cbc.ca/sports/olympics/aquatics/australia-swimming-positive-doping-sample-1.5230017)>. A Canadian example where a provisional suspension was not disclosed by the CCES but still gained media coverage is that of cyclist David Drouin. Drouin's provisional suspension was covered by *Canadian Cyclist*, who listed their source of the sanction as *La Presse*. See Canadian Cyclist, "Quebec Rider Drouin Tests Positive for Banned Substance" (1 May 2017), online: *Canadian Cyclist*, <[www.canadiancyclist.com/dailynews.php?id=32439](http://www.canadiancyclist.com/dailynews.php?id=32439)>. The story on his sanction was reported nearly a year later in March 2018. See Canadian Cyclist, "Drouin Receives Four Year Suspension" (26 March 2018), online: *Canadian Cyclist*, <[www.canadiancyclist.com/dailynews.php?id=33582](http://www.canadiancyclist.com/dailynews.php?id=33582)>. The IAAF and UCI publish lists of athletes serving provisional suspensions online. See Athletics Integrity Unit, "Provisional Suspensions in Force" (last updated 16 August 2019), online: *Athletics Integrity*, <[www.athleticsintegrity.org/disciplinary-process/provisional-suspensions-in-force](http://www.athleticsintegrity.org/disciplinary-process/provisional-suspensions-in-force)>; UCI, "Licence Holders Provisionally Suspended as per the UCI Anti-Doping Rules" (last updated 12 August 2019), online: *UCI*, <[www.uci.org/docs/default-source/clean-sport-documents/adrv/provisional-suspensions-en.pdf?sfvrsn=14d705b4\\_154](http://www.uci.org/docs/default-source/clean-sport-documents/adrv/provisional-suspensions-en.pdf?sfvrsn=14d705b4_154)>.

<sup>215</sup> CADP, *supra* note 1 at 14.3.4.

<sup>216</sup> *Ibid* at 8.3, 14.3. For what a reasoned decision should include, see World Anti-Doping Agency, *Results Management, Hearings and Decisions Guidelines* (Montreal: WADA, October 2014) at 161, Template I, "Reasoned Decision."

<sup>217</sup> CADP, *supra* note 1 at 13.7.1. The 21-day limit is for appeals to the CAS. Appeals to the SDRCC are 10 days (13.2.2). Rule 13.2.3 sets out who is entitled to appeal; it includes the person subject to the decision being appealed, the relevant international federation, the CCES, the IOC or International Paralympic Committee, and WADA.

<sup>218</sup> *Physical Activity and Sport Act*, SC 2003, c 2.

arbitrators and mediators, which is reviewed every three years; criteria for selecting arbitrators and mediators is established by the SDRCC's board of directors.<sup>219</sup>

The SDRCC is responsible for administering the doping tribunal; the tribunal determines whether or not an anti-doping rule violation has occurred and what the consequences of the ADRV should be.<sup>220</sup> The anti-doping tribunal is a single arbitrator, chosen by consensus of the parties, or failing that, appointed by the SDRCC on a rotational basis.<sup>221</sup> Doping appeal panels have three members; the CCES and the individual challenging the anti-doping rule violation each choose one member of the panel, and the SDRCC selects the third member of the panel based on the rotation of its roster of arbitrators.<sup>222</sup> Arbitrator selection may also be challenged for reasons of impartiality or bias.<sup>223</sup>

The parties who appear before the doping tribunal are the CCES (which effectively acts as the prosecutor), the person whom the CCES asserts has committed an ADRV, and the relevant sport organization.<sup>224</sup> The international sport federation, WADA, and the Canadian government may attend the hearing as observers.<sup>225</sup> Regardless of whether or not they attend, the CCES keeps WADA apprised of all cases and their results, and advises the international federation and the government of Canada on the status of the proceedings.<sup>226</sup>

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<sup>219</sup> Sport Dispute Resolution Centre of Canada, *Canadian Sport Dispute Resolution Code* (in force from 1 January 2015), online: *Sport Dispute Resolution Centre of Canada*, <[www.crdsc-sdrcc.ca/eng/dispute-resolution-code](http://www.crdsc-sdrcc.ca/eng/dispute-resolution-code)> [SDRCC Code].

<sup>220</sup> CADP, *supra* note 1 at 8.1.1.

<sup>221</sup> SDRCC Code, *supra* note 219 at 6.8(b).

<sup>222</sup> *Ibid* at 6.8(c).

<sup>223</sup> *Ibid* at 6.11. Either party can challenge the selection of an arbitrator on the basis of a lack of independence or impartiality.

<sup>224</sup> CADP, *supra* note 1 at 8.2.3.

<sup>225</sup> *Ibid*.

<sup>226</sup> *Ibid*.

Doping tribunal hearings are heard in either English or French and may be performed in person or via teleconference.<sup>227</sup> Individuals have the right to counsel.<sup>228</sup> Decisions are issued within five days of the hearing; reasoned decisions are released within 20 days.<sup>229</sup> SDRCC anti-doping tribunal decisions may be appealed to an SDRCC appeals tribunal or the CAS.<sup>230</sup>

### iii. The CAS

The Court of Arbitration for Sport (CAS) was founded in 1983. Its headquarters are in Lausanne, Switzerland; two satellite offices operate in Sydney, Australia, and New York City, and ad hoc divisions of the CAS operate in the host cities of major events like the Olympics for the duration of the event. It is funded by the IOC, international sport federations, and national Olympic committees, and is administered by the International Council of Arbitration for Sport (ICAS). The CAS adjudicates international sport disputes, including issues relating to team contracts and match fixing, as well as anti-doping. The CAS hears anti-doping appeals of asserted violations that were initially heard by the SDRCC and first instance hearings for international- or national-level athletes.<sup>231</sup> Anti-doping appeals heard at the CAS are treated as a de novo hearing and the scope of review on appeal is not limited.<sup>232</sup> The CAS Code has a choice of law option, which allows Canadian parties to choose Canadian law.<sup>233</sup>

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<sup>227</sup> *Ibid* at 8.2.4.

<sup>228</sup> *Ibid*.

<sup>229</sup> *Ibid* at 8.3.1. WADA, *Results Management*, *supra* note 216 at Template I.

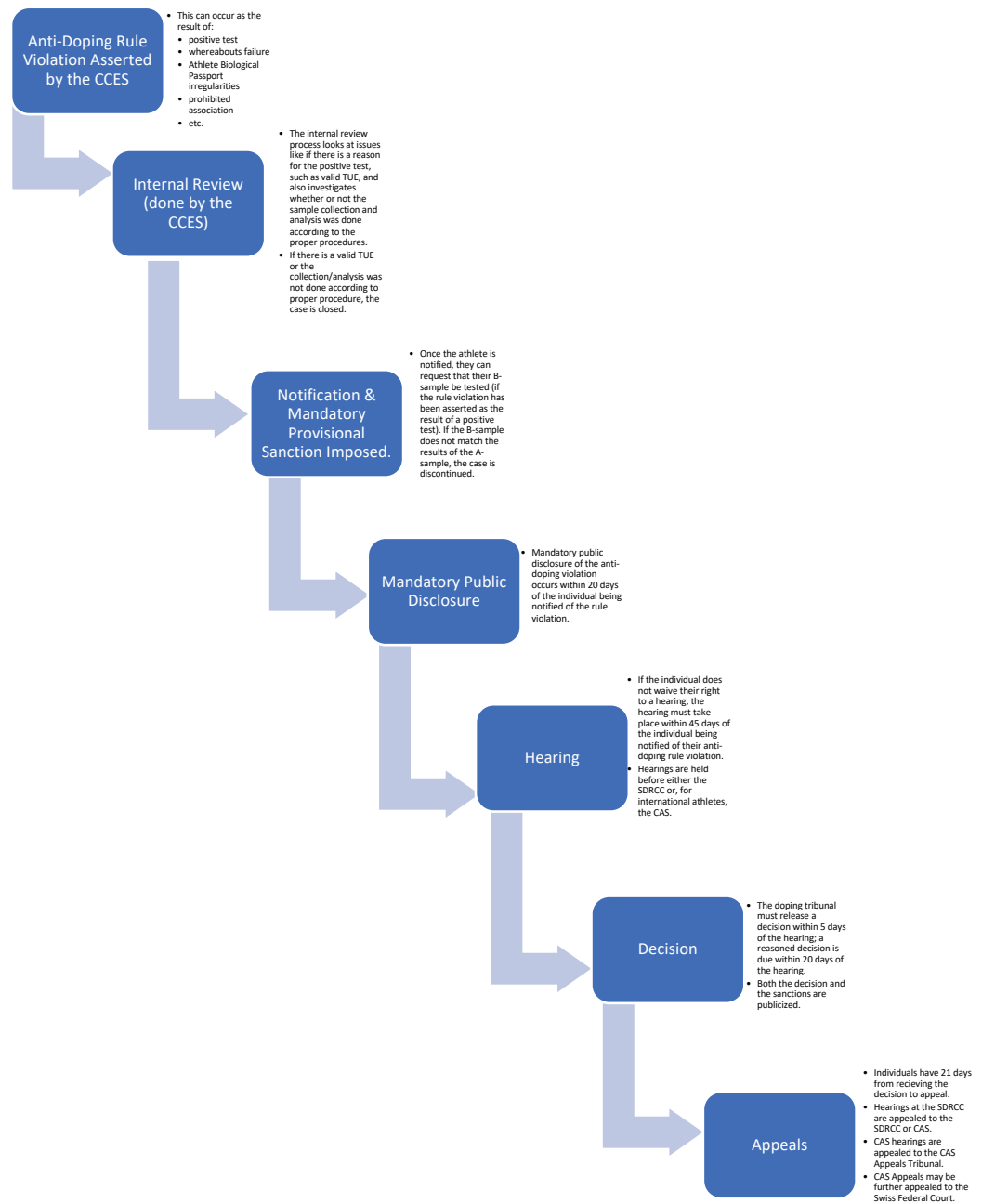
<sup>230</sup> CADP, *supra* note 1 at 13.2.1, 13.2.2.

<sup>231</sup> *Ibid* at 8.4. For a definition of international and national athletes, see p 73, Appendix 1: Definitions.

<sup>232</sup> *Ibid* at 13.1.

<sup>233</sup> Court of Arbitration for Sport, *Code of Sports Related Arbitration* (in force as of 1 January 2019) at R45: CAS <[www.tas-cas.org/fileadmin/user\\_upload/Code\\_2019\\_\\_en\\_.pdf](http://www.tas-cas.org/fileadmin/user_upload/Code_2019__en_.pdf)> [CAS Code]. Court of Arbitration for Sport, *Arbitration Rules Applicable to the CAS Anti-Doping Division* (2019), online: *Court of Arbitration for Sport* at A20 <[www.tas-cas.org/fileadmin/user\\_upload/CAS\\_ADD\\_Rules\\_\\_final\\_version\\_2019\\_.pdf](http://www.tas-cas.org/fileadmin/user_upload/CAS_ADD_Rules__final_version_2019_.pdf)> [CAS Anti-Doping Code].

**Figure 2: The Process of an Anti-Doping Rule Violation<sup>234</sup>**



<sup>234</sup> See CADP, *supra* note 1 at rules 7-15; see also WADA, *Results Management*, *supra* note 216 at Annex M.



Anti-doping tribunals at the CAS are three-person panels where each party selects an arbitrator from the CAS's roster, and the ICAS appoints the third panel member as the chair of the tribunal.<sup>235</sup> The ICAS selects arbitrators for the CAS's roster based on nominations from international federations, the IOC, national Olympic committees, or athletes' commissions of said bodies.<sup>236</sup> Arbitrator selection may be challenged by either party in a dispute on the basis of a lack of impartiality or bias.<sup>237</sup>

#### d. Key Provisions, Legal Standards, and Procedures of the CADP

Part three of the CADP comprises 20 rules, which are subdivided into related sub-rules. The bulk of the work of enforcing the CADP is done through rules 2, 4, 5, and 10, whereas other rules, such as 3 or 8, deal with some of the legal aspects of the CADP (like burdens and standards of proof and ensuring a fair hearing). This section highlights provisions, procedures, and standards of the CADP, which will be discussed in more detail in Chapters 3 and 4.

#### i. Key Provisions

Rule two gives the definition of doping and what constitutes an anti-doping rule violation (ADRV). This includes the presence of a prohibited substance in an athlete's sample,<sup>238</sup> use or attempted use of a prohibited substance or method,<sup>239</sup> evading or refusing to submit a sample,<sup>240</sup> whereabouts failures (e.g., not submitting the correct whereabouts

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<sup>235</sup> CAS Anti-Doping Code, *supra* note 233 at A15. Rule A16 permits anti-doping procedures to be completed by a sole arbitrator, chosen by consensus of the parties (or appointed by ICAS if there is no consensus).

<sup>236</sup> *Ibid* at A22; CAS Code, *supra* note 233 at S6.4.

<sup>237</sup> CAS Anti-Doping Code, *supra* note 233 at A10, CAS Code, *supra* note 233 at R34.

<sup>238</sup> CADP, *supra* note 1 at 2.1.

<sup>239</sup> *Ibid* at 2.2.

<sup>240</sup> *Ibid* at 2.3.

information),<sup>241</sup> tampering or attempted tampering with any part of doping control,<sup>242</sup> possessing a prohibited substance or method,<sup>243</sup> trafficking or attempted trafficking of a prohibited substance or method,<sup>244</sup> administration or attempted administration of a prohibited substance or method to an athlete (in or out of competition),<sup>245</sup> complicity,<sup>246</sup> and prohibited association.<sup>247</sup> Prohibited association effectively turns interactions between an eligible athlete and an ineligible individual into a doping offence for the eligible athlete if that athlete associates with an ineligible individual in a “sports-related or professional capacity.”<sup>248</sup>

Rule 4 incorporates the Prohibited List (which is published and revised annually by the World Anti-Doping Agency) into the CADP. The rule requires any person falling under the CADP to comply with the Prohibited List.

Rule 5 incorporates the International Standard for Testing and Investigations (which is published and revised by WADA) into the CADP, and grants both the CCES and WADA authority to conduct tests and investigations.<sup>249</sup> These standards include the requirements for blood sample collection, as well as the Athlete Biological Passport operating guidelines,<sup>250</sup> and whereabouts information. Testing is undertaken “to obtain

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<sup>241</sup> *Ibid* at 2.4. The Whereabouts Rule, discussed further in Chapter 4, requires athletes in the registered testing pool to provide details on their physical location for the upcoming three months. A whereabouts failure is any combination of three missed tests or filing failures (i.e., providing the wrong information).

<sup>242</sup> *Ibid* at 2.5.

<sup>243</sup> *Ibid* at 2.6.

<sup>244</sup> *Ibid* at 2.7.

<sup>245</sup> *Ibid* at 2.8.

<sup>246</sup> *Ibid* at 2.9; complicity includes, “Assisting, encouraging, aiding, abetting, conspiring, covering up or any other type of intentional complicity involving an anti-doping rule violation” or attempted anti-doping rule violation.

<sup>247</sup> *Ibid* at 2.10. Prohibited association bars any athlete from associating with an ineligible athlete support personnel in a sport-related or professional capacity.

<sup>248</sup> *Ibid* at 2.10.3.

<sup>249</sup> *Ibid* at 5.

<sup>250</sup> The Athlete Biological Passport (ABP) program monitors biological variables (provided through drug tests) over a period of time; this is intended to reveal the effects of doping, rather than detecting the

analytical evidence as to the athlete's compliance (or non-compliance) with the strict CADP prohibition on the presence/use of a prohibited substance or prohibited method."<sup>251</sup> Investigations are undertaken "in relation to atypical findings, atypical passport findings and adverse passport findings [...], gathering intelligence or evidence (in particular, analytical evidence) in order to determine whether an anti-doping rule violation has occurred [...];"<sup>252</sup> and "in relation to other indications of potential anti-doping rule violations, in accordance with [...], gathering intelligence or evidence [...] in order to determine whether an anti-doping rule violation has occurred under any of Rules 2.2 to 2.10."<sup>253</sup>

While the CADP rules generally apply uniformly to every person falling under them, there are some exceptions. For example, student-athletes are allowed to retroactively apply for a therapeutic use exemption (TUE) to justify an adverse analytical finding. In contrast to the slight relaxation of the CADP rules for student-athletes, national- and international-level athletes have additional burdens imposed on them, which subject these individuals to additional scrutiny through the whereabouts requirements and/or the athlete biological passport.

The CADP defines national-level athletes as "Athletes who compete in sport at the national level, as defined by each National Anti-Doping Organization, consistent with the International Standard for Testing and Investigations."<sup>254</sup> International-level athletes "compete in sport at the international level, as defined by each International Federation,

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substance or method used to dope. See World Anti-Doping Agency, "Athlete Biological Passport" (last visited 16 August 2019), online: *WADA*, <[www.wada-ama.org/en/athlete-biological-passport](http://www.wada-ama.org/en/athlete-biological-passport)>.

<sup>251</sup> CADP, *supra* note 1 at 5.1.1.

<sup>252</sup> *Ibid* at 5.1.2.1.

<sup>253</sup> *Ibid* at 5.1.2.2.

<sup>254</sup> *Ibid* at p 73, Appendix 1: Definitions.

consistent with the International Standard for Testing and Investigations.”<sup>255</sup>

International-level athletes may be designated as such by their international federation, national sport organization, and the CCES. Rule 1.4 notes that these athletes (national- and international-level athletes) are “the main focus of the CCES’s test distribution plan.”<sup>256</sup> The registered testing pool of athletes is chosen from the broader group of athletes; it is only this level of athlete who is subject to the additional requirements of the whereabouts program, as well as monitored through the Athlete Biological Passport.

The CADP confers very broad powers on the CCES. For example, rule 12 effectively gives the CCES authority to investigate and prosecute anti-doping rule violations as part of enforcing the CADP and the WADC. Rule 12 presents the CADP as a contract and any violations as a breach of the membership agreement between individuals and their sport organization.<sup>257</sup>

## ii. Legal Standards

The anti-doping rules fall under Part 3 of the CADP. The rules are “distinct in nature from criminal and civil laws, and are not intended to be subject to or limited by any national requirements and legal standards applicable to criminal or civil proceedings.”<sup>258</sup>

This quasi-indemnity from state legal standards is justified in the CADP because of the “distinct nature” of the CADP rules, and the argument that they “represent the consensus of a broad spectrum of stakeholders around the world as to what is necessary to protect and ensure fair sport.”<sup>259</sup>

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<sup>255</sup> *Ibid.*

<sup>256</sup> *Ibid* at 1.4.2.

<sup>257</sup> *Ibid* at 12.

<sup>258</sup> *Ibid* at p 15 (Preface to the Rules).

<sup>259</sup> *Ibid.*

The CADP imposes strict liability on athletes. Rule 2.1.1 states, “it is not necessary that intent, fault, negligence or knowing use on the athlete’s part be demonstrated in order to establish an anti-doping rule violation.”<sup>260</sup> The athlete’s fault is not considered under rule 2, but rather under rule 10, when sanctions are imposed.

One of the ways in which the CADP differentiates itself from civil or criminal legal standards is in the burden of proof. The CCES needs to establish that an anti-doping rule violation has occurred to the “comfortable satisfaction” of the doping tribunal.<sup>261</sup> “Comfortable satisfaction” is higher than a balance of probabilities, but less than the criminal standard of beyond a reasonable doubt; the CADP analogizes it to the standard required to prove professional misconduct.<sup>262</sup> Athletes need to meet the civil standard, balance of probabilities, to discharge their burden of proof when fighting an anti-doping claim.<sup>263</sup>

A final example of how the CADP differs from civil law standards is that the limitation period is 10 years from the date the asserted violation occurred.<sup>264</sup> Samples can be retested up to 10 years after they were taken, and can result in sanctionable anti-doping rule violations.

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<sup>260</sup> *Ibid* at 2.1.1 The comment to rule 2.1.1 notes that the CAS has consistently upheld the principle of strict liability for anti-doping offences.

<sup>261</sup> *Ibid* at 3.1.

<sup>262</sup> *Ibid* at Comment to rule 3.1. Issues with this standard are discussed in Chapter 4.5.i.

<sup>263</sup> *Ibid* at 3.1. In the context of criminal law, having to discharge the burden of proof on a balance of probabilities for reserve onus offences is rarely found to be constitutional; e.g., *R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 71. A provision of *Narcotic Control Act* was struck down in *Oakes* because it created the presumption that possessing narcotics was done with the intent to traffic. Having to disprove that presumption on a balance of probabilities was not constitutional.

<sup>264</sup> CADP, *supra* note 1 at 17. Compare this to a two-year limitation period in most provinces.

### iii. Procedures

Rule 7 demonstrates ways in which the CADP functions differently from the civil or criminal law system. For example, rule 7.9.1 imposes a mandatory provisional suspension on athletes effective “promptly” after an adverse analytical finding has been reviewed.<sup>265</sup> This occurs before there is a hearing so individuals are sanctioned prior to having the opportunity to fight the doping allegation.

Hearings are governed by rule 8, and appeals by rule 13. Rule 13 is one of the rules that the CADP must implement wholesale from the WADC (except for 13.2.2 (appeals involving non-international-level athletes or persons), 13.6 (appeals from decisions pursuant to rule 12—breach of contract), and 13.7 (timelines for filing appeals)). These rules outline who the parties are,<sup>266</sup> timelines in the hearing process, and steps to ensure a fair hearing and appeal.

Hearings are heard by the SDRCC and governed by their procedural code.<sup>267</sup> Parties who appear before the SDRCC waive their right to alternative relief,<sup>268</sup> so not only do athletes consent to the CADP through their agreement with the sport organization, they also consent to the jurisdiction of the SDRCC and waive their right to other means of relief when they consent to the CADP (either knowingly or unknowingly).<sup>269</sup>

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<sup>265</sup> *Ibid.* The reviews are done according to rule 7.2.

<sup>266</sup> The parties before the Doping Tribunal are the athlete or other person the CCES asserts to have committed an anti-doping rule violation, the CCES and the relevant sport organization (CADP, *supra* note 1 at 8.2.3). The parties before the Doping Appeal Tribunal are: a) the parties before the Doping Tribunal; or b) if there is no Doping Tribunal decision, the CCES and the person subject to a decision made by the CCES. (CADP, *supra* note 1 at 13.2.2.1.3).

<sup>267</sup> The exception to this rule is athletes who are considered international- or national-level athletes; these individuals may have their cases heard directly by the CAS. CADP, *supra* note 1 at 8.4.

<sup>268</sup> SDRCC Code, *supra* note 219 at 6.6 The SDRCC follows Ontario’s law for arbitration (Art 6.24).

<sup>269</sup> E.g., Jeffrey Adams argued that he did not consent to the jurisdiction of the SDRCC or the CAS to hear anti-doping disputes because it was not a term of his athlete agreement that was freely negotiated. See

Appeals are not limited in their scope to the issues before the initial decision-maker; they are effectively de novo hearings.<sup>270</sup> Appeals heard at the CAS have no obligation to defer to the original decision-maker.<sup>271</sup> The WADA has a right under the CADP to appeal under rule 13 without first exhausting all internal remedies, and can appeal a decision even when none of the other parties have decided to appeal the decision.<sup>272</sup> WADA appeals go directly to the CAS.

Anti-doping rule violations must be publicly disclosed.<sup>273</sup> This public disclosure may happen before the anti-doping tribunal has heard the case,<sup>274</sup> but after the finding has been reviewed for an applicable TUE and the proper testing procedures have been followed, and after the affected parties have been notified of the adverse analytical finding. Adverse analytical findings are determined based on lab results from a WADA-accredited lab; results are reviewed by the CCES.<sup>275</sup> The outcome of the doping tribunal is publicly disclosed on the CCES website, unless the individual is a minor or the individual has not been found guilty of an anti-doping rule violation (if that is the case, then the decision may be publicly disclosed only with the parties' consent).<sup>276</sup>

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*Adams v Canada*, 2011 ONSC 325 at para 21, 272 OAC 301. The exclusive jurisdiction of the CAS was also one of the issues touched on in *Sveshinikov*, *supra* note 65 at para 11.

<sup>270</sup> CADP, *supra* note 1 at 13.1.1, comment to rule 13.1.1, 13.1.2.1.

<sup>271</sup> *Ibid* at 13.1.2.

<sup>272</sup> *Ibid* at 13.1.3.

<sup>273</sup> *Ibid* at 14.3.

<sup>274</sup> Anti-doping hearings are to be heard no more than 45 days after the CCES notifies parties of an ADRV (*Ibid* at 8.2.1). Public disclosure happens after parties have been notified.

<sup>275</sup> *Ibid* at 7.1, 7.2.2. The CCES first reviews to see if there is a TUE or departure from the WADA lab standards. If there is no applicable TUE or departure from lab standards, then the CCES proceeds to notify affected parties.

<sup>276</sup> *Ibid* at 14.3.2, 14.3.3, 14.3.6.

## 5. Conclusion

The CADP is a self-described “collective agreement” between multiple stakeholders in the Canadian sport system, including federal and provincial/territorial governments, athletes, and sport organizations. The CADP is produced and administered by the CCES and fully compliant with the WADC, which is written by WADA. However, combatting doping in sports is more than a matter of who writes the rules on anti-doping. Although the CADP is administered by an independent not-for-profit corporation, the program itself is pivotal part of Canada’s wider anti-doping efforts.

The CADP characterizes anti-doping as a matter of great public interest and anti-doping is defended in the CADP and other anti-doping policies as protecting both the integrity of sports and the health of athletes. Despite critiques of anti-doping as failing to recognize the problematic ideology behind the “spirit of sport,” and the questionable ability of anti-doping to protect the health of athletes when participating in sport itself can damage athletes’ health, the objectives of anti-doping and the public values behind it persist. The stated objectives of the CADP and the values that anti-doping promotes reflect some of the ways governments use sport to achieve social policy outcomes that advance ethical behaviour.



# Chapter 3: Does the *Charter* Apply to the CCES or the CADP?

## 1. Introduction

There are elements of the Canadian Anti-Doping Program that could run afoul of the rights and freedoms guaranteed by the *Charter*, but in order for the CADP to attract *Charter* scrutiny, the *Charter* needs to apply to the CADP. Whether or not the *Charter* applies to the CADP is the focus of this chapter.

This chapter begins by quickly explaining why a traditional constitutional law approach is used, rather than tackling the issue through administrative law. Then it reviews anti-doping cases to examine what these decisions reveal about whether or not the *Charter* applies to anti-doping programs or policies. Next, the Canadian Centre for Ethics in Sport is analyzed using the *McKinney* framework, which helps determine if a given entity or organization is a government actor; this analysis looks specifically at the governance, funding, and decision-making authority of the CCES.<sup>1</sup> Finally, the *Eldridge* analysis is applied to the CADP to determine if the CADP itself can be considered a government action and engage *Charter* protection in that manner.<sup>2</sup> As part of the *Eldridge* analysis, this portion examines several government programs and policies requiring compliance with the CADP, and how Canada's commitments under the UNESCO Convention Against Doping in Sport may make the CADP a government action.

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<sup>1</sup> *McKinney v University of Guelph*, [1990] 3 SCR 229, 2 OR (3d) 319 [*McKinney*].

<sup>2</sup> *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge*].

## 2. Administrative Law and the CADP

The objective of this thesis is to assess the vulnerability of the CADP to a *Charter* challenge, focusing on whether the *Charter* applies to the CADP, whether provisions of the CADP potentially breach *Charter* rights, and if so, if those potential breaches are demonstrably justifiable under s 1. In addition to or as an alternative to the *Charter*, it is conceivable that the CADP could be challenged using administrative law doctrine (which must be applied instead of a conventional *Charter* analysis wherever discretionary individualized decisions affect *Charter* rights); however, an administrative law analysis faces some obstacles that may distract or detract from the objective of this thesis: determining if the CADP (understood as a set of norms of general application) is consistent with *Charter* norms.

The first administrative law hurdle involves determining whether the CADP can be regarded as public for the purposes of public law, that is, can it be regarded as an expression of government action or decision-making. In the wake of *Highwood Congregation*,<sup>3</sup> voluntary sport associations (and the decisions they make) are unlikely to attract judicial review based on administrative law principles—even if the decisions have important consequences for sport and those involved in sport.<sup>4</sup> Thus, using administrative

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<sup>3</sup> *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26, [2018] 1 SCR 750 [*Highwood Congregation*].

<sup>4</sup> E.g., In *West Toronto United Football Club v Ontario Soccer Association*, 2014 ONSC 5881 at paras 23-24, 327 OAC 29, Nordheimer J decided the Ontario Superior Court had jurisdiction to review a decision of the Ontario Soccer Association (OSA) to award victory to a team that had not in fact won the game. In coming to this conclusion, Nordheimer reflected on the public impact of the OSA to decide that its activities fell within the purview of public law. Post *Highwood Congregation*, decisions of the OSA would not be subject to judicial review. In *Highwood Congregation*, *supra* note 3 at paras 17 & 20, Rowe J emphasized that “judicial review is about the legality of state decision making.” In his view, “a decision will be considered to be public where it involves questions about the rule of law and the limits of an administrative decision maker’s exercise of power. Simply because a decision impacts a broad segment of the public does not mean that it is public in the administrative law sense of the term” (para 20).

law doctrine to determine if the CCES, rather than the CADP, is “public” for the purpose of engaging administrative law oversight would have to engage *Highwood Congregation* as well as the related jurisprudence concerning what qualifies as a federal board, commission, or tribunal under the *Federal Courts Act*.<sup>5</sup> Since *Highwood Congregation* was decided, applications for judicial review have been denied in cases like *Bell v Civil Air Search and Rescue Association et al.*<sup>6</sup> In this case, the Manitoba Court of Appeal overturned an application for judicial review granted by the Court of Queen’s Bench Manitoba because the Civil Air Search and Rescue Association (a voluntary association) did not exercise state decision-making.<sup>7</sup> The Ontario Superior Court in *Beaucage v Métis Nation of Ontario*,<sup>8</sup> also refused to grant judicial review of a decision made by the Métis Nation of Ontario on the basis that it was not a state-decision maker, as has the court of Queen’s Bench of Saskatchewan in *Quewezance v Federation of Sovereign Indigenous Nations*.<sup>9</sup> In the latter case, the Saskatchewan court held that the federation did not constitute a government or state actor (even though it was made up of members that were in themselves governments), because the federation itself did not act as a state decision-maker.

What is, arguably, missing from the administrative law jurisprudence post-*Highwood Congregation* (at least, so far) is analytical guidance of the sort provided by

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<sup>5</sup> RSC 1985 c F-7, s 2(1). In *Canadian Centre for Ethics in Sport v Russell* [2007], OJ No 2234, 158 ACWS (3d) 692 (Ont SC) [*Russell*], which is discussed in the next section, the Ontario Superior Court determined that the CCES is not a federal board, commission or tribunal.

<sup>6</sup> 2018 MBCA 96 at para 8, [2018] 12 WWR 114.

<sup>7</sup> The MBCA did not elaborate on why the Civil Air Search and Rescue Association did not exercise state decision-making other than to say “There is no question that the respondents do not exercise state decision making. Their receipt of government funding and the benefit to the public of their activities is not relevant to the analysis. Bell rightly conceded this at the hearing of the appeal” (*Ibid* at para 8). The association is “a voluntary association incorporated as a non-share capital corporation” (*Ibid* at para 3).

<sup>8</sup> 2019 ONSC 633, 2019 CarswellOnt 93.

<sup>9</sup> 2018 SKQB 313, 300 ACWS (3d) 452.

the jurisprudence under s 32 of the Charter—specifically, the *Eldridge* analysis—on determining when a private entity is engaged in government “action” for the purposes of s 32.<sup>10</sup> It is not clear if administrative law currently offers a starting-point from which to consider the CADP in light of administrative law principles, whether of procedural fairness or substantive review. That is, it seems a foregone conclusion that the CCES would not be public for the purposes of judicial review, and therefore there seems to be no way of moving to the question (which, in a conventional *Charter* analysis, is done by way of *Eldridge*) of whether the CADP is nonetheless a form of “government action.”

Even if the CCES (and by extension the CADP) were deemed public for the purposes of judicial review, other important questions arise that could undermine the value of an administrative law analysis for the purpose of this thesis. The CADP is arguably a norm of general application, not a “decision.”<sup>11</sup> Where a *Charter* challenge is

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<sup>10</sup> There are some decisions post-*Highwood Congregation* that use the *Air Canada* factors to determine whether or not a decision is “public” for the purposes of judicial review. What distinguishes those cases is that the body is more obviously a government actor, so it is the nature of the decision that is being questioned, that is, is the decision public or private, not is the decision-maker public or private. See *Aquatech v Alberta (Minister of Environment)*, 2019 ABQB 62; *Strauss v British Columbia (Minister of Public Safety)*, 2018 BCSC 1414. See also *Air Canada v Toronto Port Authority*, 2011 FCA 347, at para 60, [2013] 3 FCR 605. The factors the Federal Court considered in *Air Canada* to determine whether or not a decision should be subject to judicial review are: the character of the matter for which judicial review is sought, the nature of the decision-maker and its responsibilities, the extent to which a decision is founded in and shaped by law as opposed to private discretion, the decision-maker’s relationship to other statutory schemes or parts of government, the extent to which a decision-maker is an agent of government, or controlled or significantly influenced by government, the suitability of public law remedies for the dispute, the existence of a compulsory power, and an “exceptional” category of cases where the conduct has attained a serious public dimension.

<sup>11</sup> *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416 [*Slaight*]. Slaight challenged an arbitrator’s decision that Slaight had to write a letter of recommendation for a former employee and included info details on what the letter must include. The discretion to grant such remedies was granted by legislation. Slaight challenged whether or not the legislation granted that discretion (then considered if the arbitrator’s order violated 2(b)) so the challenge in *Slaight* was to the legislation, not the decision. See also Paul Daly, “Modes of Rights Protection II: Slaight Communications Inc. v. Davidson, [1989] 1 SCR 1038” (14 December 2016), online: *Administrative Law Matters*, <[www.administrativelawmatters.com/blog/2016/12/14/modes-of-rights-protection-ii-slaight-communications-inc-v-davidson-1989-1-scr-1038/](http://www.administrativelawmatters.com/blog/2016/12/14/modes-of-rights-protection-ii-slaight-communications-inc-v-davidson-1989-1-scr-1038/)>. Compare *Slaight* to *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, [2000] 2 SCR 1120, 193 DLR (4th) 193 [*Little Sisters*]. *Little Sisters* is an example where the SCC determined the problem was not the legislation, but rather the way

made to a law, that is, a norm of general application (which includes policy made under legislative authority), ordinary conventions of *Charter* application and analysis apply.<sup>12</sup> If a specific or individualized decision is the target of a *Charter* challenge, the *Doré* or *Loyola* analysis is used instead;<sup>13</sup> that framework was developed on administrative law principles and asks whether the decision-maker adequately balanced the statutory purpose against *Charter* rights or values. It is likely that even if administrative law applied to the CCES (and thus the CADP), the analysis would be limited to decisions made under the CADP<sup>14</sup>; questions of the CADP's validity with respect to the *Charter* would be done according to the usual *Charter* analysis.

An additional wrinkle with respect to the distinction between challenging a norm of general application and challenging a decision is that, following the *West Fraser Mills* decision,<sup>15</sup> courts may be inclined to characterize some policies as discretionary “decisions” rather than norms of general application. In *West Fraser Mills*, the Supreme Court used a reasonableness standard to review a policy instead of the conventional *ultra*

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discretion was exercised under the legislation (see 1189-1201). See also, Bruce Ryder, “The Little Sisters Case, Administrative Censorship, and Obscenity Law” (2001) 39:1 Osgoode Hall LJ 207.

<sup>12</sup> E.g., *Greater Vancouver Transit Authority v Canadian Federation of Students—British Columbia Component*, 2009 SCC 31, [2009] 2 SCR 295 [*Greater Vancouver Transit Authority*]. In this case, it was the GVTA's policy that was challenged, not a statute.

<sup>13</sup> *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 SCR 613.

<sup>14</sup> There are very few actual “decisions” made under the CADP, one being whether or not to grant a therapeutic use exemption (TUE). The CCES TUE panel determines whether or not a TUE should be granted based on WADA's *International Standard for Therapeutic Use Exemption* as well as the CCES's own TUE requirements. See Canadian Centre for Ethics in Sport, *2015 Canadian Anti-Doping Program* (1 September 2017) at 4.4.2, online: CCES, <[cces.ca/sites/default/files/content/docs/pdf/cces-policy-cadp-2015-v2-e.pdf](http://cces.ca/sites/default/files/content/docs/pdf/cces-policy-cadp-2015-v2-e.pdf)> [CADP]. TUE applications can be appealed to the SDRCC doping appeal tribunal (CADP at 4.4.6.1). See also World Anti-Doping Agency, *World Anti-Doping Code International Standard: Therapeutic Use Exemptions* (Montreal: WADA, January 2019).

<sup>15</sup> *West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 SCR 635 [*West Fraser Mills*].

*vires* analysis, which is the analysis conventionally used to assess if policies comply with their governing statute.<sup>16</sup>

Again, the objective of this thesis is to assess the CADP's vulnerability with respect to the *Charter*. While challenging questions would certainly be raised with regards to the application of administrative law doctrine to this topic, I will put those inquiries aside and stay focused on the more conventional constitutional law conundrums posed instead.

### 3. Anti-Doping Case Law and Arbitration Decisions Featuring Application of the *Charter* to the CADP and Other Anti-Doping Policies

Whether or not the *Charter* applies to the CADP has not been a topic of hot debate, either in front of judges or arbitrators. There is only one case that grapples with the question, and there are just a handful of other cases that have discussed whether or not the *Charter* applies to other anti-doping policies, like the Sport Canada *Drug Use and Doping Control in Sport* policy.

The earliest anti-doping cases to consider how anti-doping may affect constitutional rights pre-date the CADP. The first case discussing whether or not anti-doping infringed *Charter* rights is *Gray v Can Track and Field Assn*.<sup>17</sup> Gray was sanctioned under the Canadian Track and Field Association's (CTAF) anti-doping policy

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<sup>16</sup> The *ultra vires* analysis asks whether or not the decision-maker had the authority to make a decision based on the authority granted in their enabling legislation. In *West Fraser Mills*, *ibid*, the Supreme Court looked at whether or not the Workplace Compensation Board's decision to enact workplace safety regulations was reasonable, rather than whether or not the regulation itself was reasonable.

<sup>17</sup> *Gray v Can Track and Field Assn* [1986], 39 ACWS (2d) 483, 1986 CarswellOnt 2878 (Ont Hcj) [*Gray*].

for a positive drug test.<sup>18</sup> He appealed the suspension prohibiting him from competing at the Commonwealth Games for three reasons, including that his *Charter* rights were not respected because he was suspended before an anti-doping hearing took place.<sup>19</sup> The judge was “not persuaded there is any nexus between the CTAF and the federal government sufficient to invoke *Charter* rights,” and did “not believe there had been any violation of s 7.”<sup>20</sup>

Another early case that considered *Charter* application to Canada’s anti-doping policies or programs is *In the Matter of ... Sport Medicine Council and Glen Dodds*.<sup>21</sup> The Sport Medicine Council of Canada (SMCC) sanctioned Dodds following a positive drug test; the sanction included “withdrawal of eligibility for all federal government sport programs or benefits.”<sup>22</sup> Dodds appealed the sanction and denied he had ever taken the steroids for which he had tested positive. Although whether or not the *Charter* applied to the 1985 *Sport Canada Policy on Doping and Drug Use in Sports* was not an issue in this case, Arbitrator Delisle noted,

The *Charter* does apply to governmental action, s. 32(1)(a), and as Ms. Hoffman [the Director-General of Sport Canada] has testified, their policy with respect to doping control, their use of SMCC and their influence through funding with the National Sport Government Bodies to further that policy all bespeak governmental action.<sup>23</sup>

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<sup>18</sup> There is no mention in the judgement of Gray being sanctioned under the 1985 Sport Canada Policy Against Doping and Drug Use in Sport (Sport Canada. *Drug Use and Doping Control in Sport: A Sport Canada Policy, Update (September 1985)* (Ottawa: Minister of State, Fitness and Amateur Sport, 1985)). Under that policy, athletes’ only avenue to appeal an anti-doping sanction was directly to the Minister of State for Amateur Sport and Fitness. The fact that Gray was sanctioned under the CTAF’s policy and not Sport Canada’s likely contributed to the judge’s conclusion that there was not a sufficient nexus between the CTAF and the government to engage the *Charter*.

<sup>19</sup> *Gray*, *supra* note 17 at 3.

<sup>20</sup> *Ibid* at 4.

<sup>21</sup> *In the Matter of Glen Dodds and the Sport Medicine Council of Canada*, (21 May 1987), unreported decision of an independent arbitrator, (Arbitrator: RJ Delisle) [*Dodds*]. This case went to arbitration, following the process outlined in the SMCC’s *Doping Control Standard Operating Procedures Manual*. (*Dodds* at 2).

<sup>22</sup> *Ibid* at 1.

<sup>23</sup> *Ibid* at 3.

Delisle found that while the *Charter* applied, Dodds's s 7 *Charter* rights were not violated.<sup>24</sup> This decision was rendered before the Supreme Court heard either *McKinney* or *Eldridge* and gave further guidance on how to determine what is a government actor or action, but Delisle distinguished *Dodds* from the Ontario High Court's 1986 decision in *McKinney*, finding that NSOs are not autonomous from government.<sup>25</sup> *Dodds* can also be distinguished from *Gray* because *Dodds* challenged Sport Canada's anti-doping policy; *Gray* challenged the CTAF's anti-doping policy.

In *Russell*, the CCES challenged a Sport Dispute Resolution Centre of Canada decision that reinstated a swimming coach who had been prohibited from coaching under the 1993 Canadian *Policy on Penalties for Doping in Sport*. Russell successfully applied to the SDRCC to have his lifetime ban rescinded, but the CCES argued that Russell obtained his result fraudulently because he failed to disclose a conviction that he had received in the United States for conspiring to traffic ecstasy. The CCES won their case and the matter was sent back to the SDRCC for reconsideration.

The *Russell* decision is confusing in that it focuses on the decision-making authority of the CCES rather than that of the SDRCC, even though it is an SDRCC decision that the CCES challenged. Russell argued the decision-maker was the CCES and not the SDRCC because under the 1993 policy (the one under which he had been sanctioned), reinstatement decisions were made by the national sport organization or the Canadian Centre for Drug-Free Sport, the predecessor to the CCES.<sup>26</sup> Because Russell argued the Federal Court should have jurisdiction on the basis that the CCES was a

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<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*, citing *McKinney v University of Guelph* [1986], 57 OR (2d) 1, 32 DLR (4th) 65 (Ont HC).

<sup>26</sup> *Russell*, *supra* note 5 at paras 58 & 62; see generally paras 56-63.



federal board or tribunal, the Ontario Superior Court had to determine whether or not it had jurisdiction to hear the case; it concluded:

I agree with the Coaches [Association of Canada] that the Anti-Doping Policy which involves consultation between the federal government and CCES cannot be construed as representing an Act of Parliament. While the federal government has played a collaborative role in the development of anti-doping policy, this is not required by any federal act and is within the context of federal funding matters.<sup>27</sup>

The court determined that the CCES is not a federal board, commission, or tribunal, and that arbitration bodies also do not constitute federal boards, commissions, or other tribunals and therefore the court had jurisdiction.<sup>28</sup> While the judgement does not make a decision on whether or not the 1993 anti-doping policy was a government action, it acknowledges that there is government involvement and action in developing anti-doping policy.

*Adams v Canada* is the only case that has directly questioned if the *Charter* applies to the CADP.<sup>29</sup> Jeffrey Adams sought judicial review of an arbitral decision from the SDRCC that resulted from an anti-doping rule violation. The respondents, the CCES and the Attorney General of Canada, applied to have the application quashed on the basis that the Ontario Divisional Court did not have jurisdiction to grant judicial review of arbitral decisions related to sports competition because of a contract between Adams and his NSO that required all sports-related disputes be settled at the SDRCC. The stated

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<sup>27</sup> *Ibid* at para 70.

<sup>28</sup> The *Physical Activity and Sport Act*, SC 2003, c 2, s 9(4) explicitly states that the SDRCC is not a federal board or tribunal. Russell tried to argue that because the SDRCC was conducting his reinstatement hearing based on the 1993 *Policy on Doping in Sports* and the 1994 *Standard Operating Manual*, it thus functioned as a federal board, commission, or other tribunal. See *Russell*, *supra* note 5 at para 58. The court determined that Russell's jurisdiction argument was not an application for judicial review, but "an attempt to reargue the issue in a new forum" (para 63). Russell would also have had to prove that the Federal Court had specifically been assigned jurisdiction to hear cases under legislation like the *Arbitration Act* (para 69).

<sup>29</sup> *Adams v Canada*, 2011 ONSC 325 [*Adams 2011*].

central issue the court determined was “whether this court’s jurisdiction is ousted by an agreement signed by Mr. Adams, which provides that all disputes will be resolved by binding arbitration.”<sup>30</sup>

Adams argued that the SDRCC did not have jurisdiction to deal with the issues raised in his case, namely that the CCES had violated his *Charter* and human rights by failing to provide him with a sterile catheter for a urine test required for doping control.<sup>31</sup> The SDRCC doping tribunal found that neither the *Charter* nor federal human rights legislation applied to the CADP (it did find that Ontario’s human rights legislation applied to the CADP, but had not been breached) and applied a two-year suspension. Adams appealed this decision to the Court of Arbitration for Sport, which upheld the SDRCC’s finding that the *Charter* did not apply to the CADP and that the Ontario *Human Rights Act* had not been violated; however, the CAS reduced his suspension.

Following the CAS decision, Adams launched his application for judicial review.<sup>32</sup> In the application for judicial review, the respondents (the CCES and the Attorney General of Canada) argued that the Ontario Divisional Court did not have jurisdiction to grant judicial review because of the Athlete Assistance Program (AAP) agreement Adams signed with Sport Canada. The AAP requires athletes submit all disputes to the SDRCC; the SDRCC requires that parties waive their right to alternative relief.<sup>33</sup> Adams argued that the arbitration clause was not a “true agreement” or “freely negotiated,”<sup>34</sup> and therefore was not valid. The Divisional Court rejected that argument

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<sup>30</sup> *Ibid* at para 1.

<sup>31</sup> *Ibid* at para 10.

<sup>32</sup> At the same time, Adams also launched a civil suit against the CCES. That suit is not related to whether or not the *Charter* applies to the CADP.

<sup>33</sup> Sport Dispute Resolution Centre of Canada, *Canadian Sport Dispute Resolution Code* (in force from 1 January 2015) at 6.6, online: *SDRCC*, <[www.crdsc-sdrcc.ca/eng/dispute-resolution-code](http://www.crdsc-sdrcc.ca/eng/dispute-resolution-code)> [SDRCC Code].

<sup>34</sup> *Adams 2011*, *supra* note 29 at paras 21, 28.

on the basis that “Nobody forced Mr. Adams to participate in national and international sport competition. He freely chose to do that.”<sup>35</sup>

The SDRCC’s jurisdiction is limited to sports-related disputes. The *Physical Activity and Sport Act* states “The mission of the [Sport Dispute Resolution] Centre is to provide the sport community (a) national alternative dispute resolution service for sports disputes.”<sup>36</sup> The act clarifies, “a sport dispute includes disputes among sport organizations and disputes between a sport organization and persons affiliated with it, including its members.”<sup>37</sup> The SDRCC’s Code grants the arbitration panel “the full power to review the facts and apply the law.”<sup>38</sup> Arbitrator Richard McLaren in *Adams 2006* interpreted the grant of jurisdiction as extending to considering the *Charter*.<sup>39</sup> The Divisional Court judge also pointed out that while Adams could bring an application for judicial review based on clause 46(1)(5) of the Ontario *Arbitration Act*,<sup>40</sup> the Divisional Court would *not* have jurisdiction to hear the case because the Attorney General took “the position that the arbitrator had no jurisdiction to grant a *Charter* remedy,” thus, such an application “can only be made to the Superior Court of Justice” because “nothing in the *Arbitration Act* gives jurisdiction to the Divisional Court” to grant *Charter* remedies.<sup>41</sup>

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<sup>35</sup> *Ibid* at para 29.

<sup>36</sup> *Physical Activity and Sport Act*, *supra* note 28 at s 10(1)(a).

<sup>37</sup> *Ibid* at s 10(2).

<sup>38</sup> SDRCC Code, *supra* note 33 at 6.17(a).

<sup>39</sup> SDRCC DT-06-0039 *Canadian Centre for Ethics in Sport v Jeffrey Adams*, (2006) Sport Dispute Resolution Centre of Canada (Arbitrator Richard McLaren) at para 145, online: SDRCC, <www.crdsc-sdrcc.ca/resource\_centre/pdf/English/507\_SDRCC\_DT-06-0039.pdf> [*Adams 2006*].

<sup>40</sup> *Arbitration Act, 1991*, SO 1991 c 17, s 46(1)(5): “The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.”

<sup>41</sup> *Adams 2011*, *supra* note 29 at para 32. The lack of jurisdiction to grant *Charter* remedies is perhaps one of the reasons the respondents said, “for purposes of this motion only, it can be taken that the activities of CADP and the Centre for Ethics do constitute government action and are subject to the *Charter*.” See *Adams 2011*, *supra* note 29 at para 20.

The Divisional Court judge made no finding with respect to whether or not the *Charter* applies to the CADP.<sup>42</sup>

In Adams's cases at the SDRCC and the CAS, the SDRCC accepted that the *Charter* did not apply to the CCES because:

The CCES does not wield coercive powers pursuant to statutory authority to which the *Charter* applies. Furthermore, the CCES is not a statutory body or agency of the government of Canada. It is the CCES, a private non-governmental entity, and not any government body, administering doping control rules, which are conducted primarily to ensure the fairness of privately-held sporting competitions.<sup>43</sup>

The Attorney General appeared in support of the CCES at these hearings, and their arguments (which were accepted by the SDRCC Doping Tribunal) that the *Charter* did not apply were: that the CCES is a not-for-profit corporation and “does not act pursuant to any statutory authority”<sup>44</sup>; that CCES has complete control over its governance; that the government of Canada does not direct or control the daily operations of the CCES; and that the government's relationship to the CCES is solely governed by contribution agreements.<sup>45</sup> Further, the Doping Tribunal concluded that:

In contrast to the facts in *Eldridge*, the CADP Rules are not part of a comprehensive government program under the overall control of the government and the government has not obligated itself to provide services relating to the administration of sport-related doping control rules. The government did not create nor does it control the CADP and the actions of the CCES pursuant to the CADP Rules are not those of the government of Canada. The CADP Rules are the result of international collaboration amongst largely private non-governmental entities and they must be complied with in order to uphold contractual obligations relating to voluntary participation in privately-sanctioned sporting events.<sup>46</sup>

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<sup>42</sup> As mentioned in the previous footnote, this may be because the judge did not have to determine if the *Charter* applied to the CADP or not, based on the respondents' limited concession that it applied.

<sup>43</sup> *Adams 2006, supra* note 39 at para 155.

<sup>44</sup> *Ibid*, emphasis in original.

<sup>45</sup> *Ibid*.

<sup>46</sup> *Ibid* at para 162.

Although appeals to the CAS are de novo hearings, the CAS panel followed the same reasoning as the SDRCC in concluding that the *Charter* did not apply.<sup>47</sup>

While the case law suggests that the CADP is not covered by the *Charter*, none of the decisions above, particularly *Adams*, includes an in-depth analysis of the pervasiveness of government actions underlying anti-doping in Canadian sport and the CADP itself. The following sections will examine more closely whether the *Charter* applies based on whether or not the CCES is a government actor or whether or not the CADP is a government action, and argue that the CADP is part of a comprehensive government program and anti-doping in Canada is a government action.

#### 4. *Charter* Application

Section 32(1) of the *Charter* states that the *Charter* applies:

- a. to the Parliament and the government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and the Northwest Territories; and
- b. to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.<sup>48</sup>

In order for something to fall under the *Charter*, there needs to be a government actor or a government action.<sup>49</sup> The Supreme Court established that the *Charter* does not apply to private disputes in *Dolphin Delivery*, stating that the *Charter* “was intended to restrain

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<sup>47</sup> CAS 2007/A/1312 *Jeffrey Adams v Canadian Centre for Ethics in Sport*, (2007) Court of Arbitration for Sport (Arbitrators Mark Baker, Edward Ratushny, Graeme Mew), at paras 1-14, online: CAS, <jurisprudence.tas-cas.org/Shared%20Documents/1312.pdf> [*Adams 2007*]. The CAS panel notes in the alternative that, should the *Charter* apply, they would follow Professor Hogg’s advice in showing judicial restraint and decide the case on non-constitutional grounds (i.e., human rights legislation) rather than constitutional grounds.

<sup>48</sup> *Canadian Charter of Rights and Freedoms*, s 7, *Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 at s 32(1) [*Charter*].

<sup>49</sup> *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at 598-99, 33 DLR (4th) 174 [*Dolphin Delivery*]. “It is my view that s. 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government. It will apply to those branches of government whether or not their action is invoked in public or private litigation.”

government action and protect the individual.”<sup>50</sup> If the entity is considered “government” for purposes of the *Charter*, all of its actions will be subject to the *Charter*. If an entity is not considered government, but rather the activity in which it engages is considered to be a government action, the action itself (e.g., the provision of medical services) must comply with the *Charter*. The dominant legal analyses for whether or not something is considered a government action or actor are discussed and applied to the CCES and the CADP below.

#### a. The Test for *Charter* Application: Government Actor

The test whether or not an entity is considered a government actor was set out by the Supreme Court of Canada in *McKinney*.<sup>51</sup> The Supreme Court is clear that an entity having a public purpose is not enough for something to fall under the *Charter*; rather, the actor must be “governmental in nature.”<sup>52</sup> The *McKinney* test, or “the control test,” applies when the actor is not obviously government (for example, when the actors are entities such as universities or hospitals).<sup>53</sup> It looks at factors such as funding, governance, and decision-making authority to determine whether or not the government has a sufficient level of control over the body in question such that that body can be

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<sup>50</sup> *Ibid* at 593.

<sup>51</sup> *McKinney*, *supra* note 1. Other cases, for example *Eldridge*, *supra* note 2 and *Pridgen v University of Calgary*, 2012 ABCA 139, 350 DLR (4th) 1, show how the *Charter* may apply to actors that are not governmental in nature, but the *Charter* applies because the *action* is governmental in nature. See also *Greater Vancouver Transit Authority*, *supra* note 12 at para 22.

<sup>52</sup> “A public purpose test is simply inadequate. It is fraught with difficulty and uncertainty.” See also *Eldridge*, *supra* note 2 at para 44.

<sup>53</sup> Wilson J names the framework used in *McKinney*, *supra* note 1 “the control test” in her dissent, where she explains what she finds problematic about it (see 359-361).

considered a government actor.<sup>54</sup> The standard is not total control, but rather that the entity is subject to “regular and routine” control from the government.<sup>55</sup>

Typically, independent not-for-profit corporations (like the CCES) are not considered government actors unless it can be demonstrated based on the control test that they function as an arm of government. In *McKinney*, the Supreme Court used the control test to conclude the *Charter* does not apply to the action of a university implementing a mandatory retirement policy because the analysis showed the university had autonomy over its day-to-day activities. Despite that fact the university’s board was largely appointed by government, despite the fact that the university was largely funded by government, and despite the fact that the university was established by statute, the university was not functioning as an arm of government in making decisions such as retirement policies.<sup>56</sup>

The *McKinney* control test was used to determine if other university actions in different contexts, for example establishing the terms of collective agreements or imposing disciplinary sanctions, fall under the *Charter*.<sup>57</sup> In *Douglas College*, the Supreme Court determined that the *Charter* applied to the college’s mandatory retirement requirement, because unlike in *McKinney*, the government had significant control over the programs and policies offered by the college, and the college itself was subject to

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<sup>54</sup> *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483 at 534, 76 DLR (4th) 700 [*Stoffman*]. In her dissent in *Stoffman*, Wilson J listed the factors of the control test as governing structure, policy, and funding.

<sup>55</sup> *Eldridge*, *supra* note 2 at paras 36, 40.

<sup>56</sup> *McKinney*, *supra* note 1. As discussed below, *Pridgen*, *supra* note 51 held that universities are not *Charter*-free zones and distinguished *McKinney* on the basis that decisions like hiring and firing are private decisions, compared to other decisions that affect the university’s ability to deliver programs according to government policy.

<sup>57</sup> *Douglas/Kwantlen Faculty Assn v Douglas College*, [1990] 3 SCR 570, 118 NR 340 [*Douglas College*]; *Pridgen*, *supra* note 51.

direct and substantial control, even in negotiating and administering collective agreements.<sup>58</sup> *Douglas College* was distinguished from *McKinney* on the basis that Douglas College was an agent of the Crown and could only exercise its powers as such, (e.g., it had no autonomy over its operations, including policies, services, bylaws, etc.), whereas the universities in *McKinney* were not agents of the Crown, but rather autonomous institutions. In *Pridgen*, the Alberta Court of Appeal determined that some university actions constitute government actions; a university's imposition of disciplinary sanctions was not private decision-making on the basis that Alberta has specific legislation that "deals with a university's authority to discipline students."<sup>59</sup> The University of Calgary, by virtue of the *Post-Secondary Learning Act*, has "the power to impose serious sanctions that go beyond the authority held by private individuals or organizations."<sup>60</sup> The Alberta Court of Appeal determined that students' *Charter* rights were protected when universities imposed disciplinary sanctions (such as fines, suspensions, and expulsions) because those actions have a public element, which can only be exercised pursuant to the statutory authority granted to universities under the *Post-Secondary Learning Act*.<sup>61</sup> In coming to this conclusion, Justice Paperny noted:

The *Charter* has often been held to apply to the rules, policies and decisions of bodies that affect the autonomy and livelihood of regulated individuals. Unlike the internal affairs of a purely private organization, the regulation of a profession often has a public dimension as, for example, in affecting the manner in which the professional may interact with the public through advertising. There are many examples of cases where a public aspect to regulation or disciplinary proceedings have led courts to

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<sup>58</sup> *Douglas College*, *supra* note 57 at 585.

<sup>59</sup> *Pridgen*, *supra* note 51 at para 48.

<sup>60</sup> *Ibid* at para 105; *Post-Secondary Learning Act*, SA 2003, c P-19.5.

<sup>61</sup> *Pridgen*, *supra* note 51 at para 105; see also para 91: "Where a statutory authority is being exercised, the *Charter* will apply not only to rules and regulations enacted pursuant to that authority, but also to the application and interpretation of those rules in making decisions."



conclude that limits placed on the regulated individual's freedom of expression and association are subject to the *Charter*.<sup>62</sup>

The control test analysis is contextual; factors that may seem determinative (such as being established under a statute or being privately incorporated<sup>63</sup>) are not singularly conclusive as to whether or not an actor is controlled by government to the extent it can be considered a government actor. Precedent from one case, for example mandatory retirement at universities, does not always indicate that a similar requirement at a different institution, would have to the same result regarding *Charter* application.

#### b. Applying the Test: Is the CCES a Government Actor?

The CCES is an independent non-for-profit corporation. As such, its legal status is that of a private legal entity, not government. The CCES is named as Canada's national anti-doping agency in the CADP and the *Canadian Policy Against Doping in Sport—2011*.<sup>64</sup> The World Anti-Doping Agency recognizes the CCES as Canada's NADO because the CCES is Canada's signatory to the World Anti-Doping Code.<sup>65</sup> The UNESCO *Convention Against Doping in Sport* allows for state parties to meet their Convention obligations by relying on their NADO.<sup>66</sup> Although it is not specifically designated in any Canadian legislation, the CCES is specifically mentioned in several Canadian policies

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<sup>62</sup> *Ibid* at para 92, commenting on professional bodies regulating their members, which Paperny found "to be of particular relevance to the case before us."

<sup>63</sup> See e.g., *McKinney*, *supra* note 1 at 265-66: "But the mere fact that an entity is a creature of statute and has been given the legal attributes of a natural person is in no way sufficient to make its actions subject to the *Charter*."

<sup>64</sup> CADP, *supra* note 14 at 4.1; Government of Canada, *Canadian Policy Against Doping in Sport—2011* (11 February 2011) at 3, online: *Canada*, <[www.canada.ca/en/canadian-heritage/services/sport-policies-acts-regulations/policy-against-doping-sport.html](http://www.canada.ca/en/canadian-heritage/services/sport-policies-acts-regulations/policy-against-doping-sport.html)> [CPADS-2011].

<sup>65</sup> World Anti-Doping Agency, "National Anti-Doping Organizations (NADO)" (last visited 15 August 2019), online: *WADA*, <[www.wada-ama.org/en/who-we-are/anti-doping-community/national-anti-doping-organizations-nado](http://www.wada-ama.org/en/who-we-are/anti-doping-community/national-anti-doping-organizations-nado)>.

<sup>66</sup> UNESCO, *International Convention Against Doping in Sport 2005*, 19 October 2005, 2419 UNTS 201 (entered into force 1 February 2007) at Art 7.

and programs as being responsible for administering the CADP.<sup>67</sup> Its precursor, the Canadian Centre for Drug-Free Sport, was incorporated with the specific purpose of administering The Canadian Anti-Doping Program, following the recommendations of the Dubin Commission.<sup>68</sup>

The case law shows the *Charter* can apply to incorporated entities, like universities, if they are sufficiently “governmental in nature” based on the *McKinney* control test.<sup>69</sup> This analysis looks at whether the CCES meets the government actor test based on its governance, funding, and decision-making authority.

#### i. Governance

In *McKinney*, the Supreme Court analyzed the governance of universities, looking at factors like how the board is appointed, in whose interest the board acts (that is, does it act at the direction of government or in the interests of the institution), and if the government had legal control over the university.<sup>70</sup> These governance factors indicated a low level of government involvement and were not sufficient for the Supreme Court to conclude that the University of Guelph was a government actor based on government control of the university’s governance. In contrast, the governance of Douglas College indicated government control because the B.C. government appointed the college’s board

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<sup>67</sup> E.g., CPADS-2011, *supra* note 64, Canadian Heritage, *Sport Canada Athlete Assistance Program Policies and Procedures* (Ottawa: Public Works and Government Services Canada, 2015) [AAP]; Government of Canada, “Application Guidelines: Sport Support Program” (Last modified 18 June 2019), online: *Canada*, <[www.canada.ca/en/canadian-heritage/services/funding/sport-support/national-organization/application-guidelines.html](http://www.canada.ca/en/canadian-heritage/services/funding/sport-support/national-organization/application-guidelines.html)> [SSP]; Sport Canada, *Sport Canada Strategy on Ethical Sport 2010* (Ottawa: Canadian Heritage, 2011) [SCSES].

<sup>68</sup> Charles Dubin, *Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance*, (final report of commission), Commissioner Charles Dubin (Ottawa: Minister of Supply and Services Canada, 1990) at 538-40 (recommendation 11) [Dubin Commission]; Canadian Centre for Ethics in Sport, “History of Anti-Doping in Canada,” (last visited 14 August 2019), online: *CCES* <[cces.ca/history-anti-doping-canada](http://cces.ca/history-anti-doping-canada)>.

<sup>69</sup> *Eldridge*, *supra* note 2.

<sup>70</sup> *McKinney*, *supra* note 1 at 272-73.

and all board members served at the pleasure (rather than for a set term) of the government.<sup>71</sup>

The governance structure of the CCES does not support the argument that the CCES is a government actor. The CCES has a twelve-member board of directors, which is responsible for managing the business and affairs of the organization.<sup>72</sup> Individuals on the board can be nominated by anyone. The CCES nominations committee reviews each nomination and brings forward their recommendations to the board.<sup>73</sup> New board members are voted onto the board at the CCES AGM.<sup>74</sup> There is no government involvement in the governance of the CCES: the government plays no role in the selection, formation, or appointment of individuals to the CCES's board. The CEO of the CCES answers to the board, not the government.

Governance also relates to who sets the policy for an organization, that is, who establishes the overarching vision for an organization and determines how to achieve it. In *Douglas College*, the minister “was empowered to establish policy or issue directives regarding post-secondary education and training.”<sup>75</sup> In *Pridgen*, the “Student Misconduct Policy” was created pursuant to the *Post-Secondary Learning Act*.<sup>76</sup> In *McKinney*, the Supreme Court determined that mandatory retirement was not a government policy: “The government had no direct involvement in the policy of mandatory retirement instituted by the universities.”<sup>77</sup> In the instance of the CCES, the board has the authority to set the

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<sup>71</sup> *Douglas College*, *supra* note 57 at 571.

<sup>72</sup> Canadian Centre for Ethics in Sport, “By-laws” (28 August 2014) [unpublished, on file with the author] at arts 5.01, 4.01 [2014 By-laws].

<sup>73</sup> CCES, “Governance” (last visited 01 September 2019), online: CCES, <[www.cces.ca/governance](http://www.cces.ca/governance)>.

<sup>74</sup> CCES, 2014 By-Laws, *supra* note 72; Email from Paul Melia to Kate Scallion (4 July 2019).

<sup>75</sup> *Douglas College*, *supra* note 57 at 571.

<sup>76</sup> *Pridgen*, *supra* note 51 at para 49.

<sup>77</sup> *McKinney*, *supra* note 1 at 240.

policy direction for the organization,<sup>78</sup> even if some of the policy directions in the CADP—such as the mandatory provisions of the WADC—seem to be dictated by a higher entity (WADA) rather than the CCES board.

## ii. Funding

In *McKinney*, the Supreme Court summarized how the Ontario government provides funding to universities, and what strings come attached to that funding:

It [the Ontario government] heavily funds universities on an ongoing basis. The operating grants alone range, according to the evidence, between a low for York of 68.8% of its operating funds to a high for Guelph of 78.9%. The Ontario Council on University Affairs makes annual global funding recommendations to the government, but the latter assumes responsibility for determining the amounts. It also effectively defines tuition fees within a formula that limits the universities' discretion within a narrow scope. The province also provides most of the funds for capital expenditures, and provides special funds earmarked to meet specific policies. It exercises considerable control over new programs by requiring that they be specifically approved to be eligible for public funds.<sup>79</sup>

Government funding is rarely a blank cheque for recipients to spend completely at their discretion; it comes with limitations and obligations. In *McKinney*, the amount of money universities received was determined by the government; it was either earmarked for capital expenses or specific policies; and new programs had to be approved by government prior to receiving funding. The amount of funding and the determination of how it will be allocated indicates government involvement, but even significant control over how much money is received and how it is spent does not indicate government

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<sup>78</sup> E.g., Canadian Anti-Doping Agency, “By-laws” (18 March 1992) [unpublished, on file with the author] at Art 4.01: “Management of the business and affairs of the organization shall be vested in the board” [1992 By-laws]; see also 2014 By-laws, *supra* note 72: the board selects its own members (Art 2.01), can discipline its own members (Art 3.02), and appoint officers (Art 7.01): “The powers of officers are specified by the board, including delegating general supervision of the affairs of the corporation to the CEO, who is appointed by the board.”

<sup>79</sup> *McKinney*, *supra* note 1 at 272.

control to the point that the recipient is considered a government actor. Even in *Douglas College*, government funding was not the deciding factor for if Douglas College was an agent of government, but was rather just one element of the ways in which government exercised operational control over the college.

The CCES receives a significant portion of its funding from the federal government through Sport Canada. According to the 2017-18 Index to Financial Statements, Sport Canada provided more than \$6.5 million of the CCES's revenue, accounting for approximately 73 percent of its funding.<sup>80</sup> This funding is allocated into the CCES's operating budget, along with funding from other sources.<sup>81</sup> The operating fund is used to deliver the CADP as well as the CCES's administrative activities.<sup>82</sup> According to the 1992 bylaws, operations of the CCES "are to be carried on without the purpose or gain for the members and any profits or other accretions to the Organization shall be used solely in promoting its objects."<sup>83</sup> However, as shown in cases like *McKinney*, an entity can receive a majority of its funding from government and still not be considered a government actor such that the *Charter* applies.<sup>84</sup> Further, an entity can receive most of its funding from government and serve a public purpose without triggering *Charter* application. This raises questions about the analytical value of

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<sup>80</sup> GGFL Chartered Professional Accountants. *Canadian Centre for Ethics in Sport Financial Statements for the Year Ended March 31, 2018* (Ottawa: GGFL, 20 June 2018), at 5 online: CCES, <[www.cces.ca/annual-reports](http://www.cces.ca/annual-reports)> [CCES 2018 Financial Statements].

<sup>81</sup> *Ibid* at 5.

<sup>82</sup> *Ibid* at 7, note 2.

<sup>83</sup> CADO, 1992 By-laws, *supra* note 78 at 2.04. This clause carries little weight as the 1992 bylaws have been replaced (most recently in 2014) and there is no equivalent clause in the new bylaws.

<sup>84</sup> *McKinney*, *supra* note 1 at 272: The University of Guelph received 78.9 percent of its funding from government; York University received 68.8 percent.

government funding to the control test, particularly if bodies that rely on government funding to operate lose the ability to do so if government funding is withdrawn.<sup>85</sup>

Although the government provides most of the CCES's budget, it has no say in how the CCES uses its operational budget. According to the Government of Canada's 2018 Public Accounts, its contract with the CCES is worth \$6 million.<sup>86</sup> The CCES has to provide audited annual financial statements, but those are required by legislation, the *Canada Not-for-Profit Corporations Act*, not as a condition of funding.<sup>87</sup>

The CCES's revenue (from all sources) in 2017-18 was \$8,895,596; its expenditures during the same time were \$8,743,109.<sup>88</sup> The second biggest expenditure (behind salaries and benefits) was laboratory services and testing supplies, costing \$2,477,647.<sup>89</sup> The auditors also noted that the CCES had budgeted \$120,731 to purchase doping control supplies.<sup>90</sup>

Although funding is not determinative, it is worth noting that the body that administered the CADP prior to the CCES, the SMCC effectively lost the ability to function after it lost the funding from Sport Canada for anti-doping. Sport Canada provided about half of the SMCC's budget through its anti-doping funding.<sup>91</sup> The CCES

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<sup>85</sup> E.g., The SMCC folded not long after losing government funding to administer anti-doping. The SMCC, like the CCES, was an independent not-for-profit corporation delivering a public service (anti-doping as well as the professional development of sports medicine with a goal to furthering high performance sport in Canada). See e.g., Parissa Safai, "The Demise of the Sport Medicine and Science Council of Canada" (2005) 36 Sport History Rev 91.

<sup>86</sup> Government of Canada, *Public Accounts of Canada, 2018* (6 November 2018), at vol 1, s 11, "Contractual Obligations," Table 11.3, online: *Canada*, <[www.tpsgc-pwgsc.gc.ca/recgen/cpc-pac/2018/vol1/s11/oc-co-eng.html](http://www.tpsgc-pwgsc.gc.ca/recgen/cpc-pac/2018/vol1/s11/oc-co-eng.html)>.

<sup>87</sup> *Canada Not-for-Profit Corporations Act*, SC 2009, c 23, ss 172, 191.

<sup>88</sup> GGFL, *supra* note 80 at 5.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid* at 12, note 9. The supplies were budgeted for the 2017-18 fiscal year, but had not been received by the year end, which resulted in an unexpected surplus in the financial statements; the cost would then be transferred over to the 2018-19 fiscal year.

<sup>91</sup> Safai, *supra* note 85.

self-generates less than one-quarter of its revenue.<sup>92</sup> The eventual demise of the SMCC, which is related to losing the funding for anti-doping,<sup>93</sup> indicates that without government financial support, the CCES would likely also have to close its doors, leaving the administration of the CADP in jeopardy. However, whether or not the CCES would continue to operate without government funding does not mean that the CCES is a government actor, nor is it a decisive indicator of government control.

### iii. Decision-Making Authority

Decision-making authority refers to who has control over the operational decisions, the day-to-day decisions, in addition to who sets the policy for the entity. This is different from governance in that decision-making authority applies at the practical level and refers to the everyday minutiae of running an organization and implementing its vision.

Governance is more concerned with control over how an entity is established and general oversight of the entity instead of overall management. For example, in *Douglas College*, the Supreme Court found that the college was “simply part of the apparatus of government both in form and in fact”<sup>94</sup> and did not operate as an autonomous body or manage its own affairs.<sup>95</sup> This was based on the fact that the B.C. government “may at all times by law direct its operation.”<sup>96</sup>

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<sup>92</sup> GGFL, *supra* note 80 at 5, indicate that CCES’s self-generated revenue is from ethical sport enterprises (i.e., fee-for-service drug testing.)

<sup>93</sup> Safai, *supra* note 85.

<sup>94</sup> *Douglas College*, *supra* note 57 at 584.

<sup>95</sup> *Ibid* at 579.

<sup>96</sup> *Ibid* at 584. Directing the operation of the college was viewed as separate from the fact that the B.C. Government also had complete control over the board of the college.

The CCES has a very broad mandate when it comes to promoting anti-doping and values-based sport. For example, the 2019 High Performance Sport Strategy states that the role and responsibility of the CCES in Canada's sport system is:

To elevate the conscience of sport in Canada by activating a values-based and principle-driven sport system, advocating for sport that is fair, safe and open and protecting the integrity of sport. The CCES, in collaboration with key stakeholders, works to achieve doping-free sport and to protect the right of athletes to compete in a fair and ethical sport environment. They ensure adherence to the World Anti-Doping Policy [*sic*].<sup>97</sup>

The CCES enforces the WADC and it works with stakeholders in the Canadian sport system to promote and develop values-based sport (which goes beyond anti-doping) as part of its mission to protect the integrity of sport, without the integrity of sport being clearly defined anywhere. The lack of specific parameters around the CCES's role in achieving its objective of doping-free sport indicates it has very broad discretion in its actions in pursuit of its aim to "make sport better."<sup>98</sup>

The government does not direct the operations of the CCES; that power is vested with the board and the CEO.<sup>99</sup> The CCES has the autonomy to direct and develop its own business beyond administering the CADP nationally.<sup>100</sup> The CCES determines which athletes to test as part of the registered testing pool (that is, those athletes required to submit whereabouts information),<sup>101</sup> though "the pool of highest priority athletes is

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<sup>97</sup> Government of Canada, *2019 Canadian High Performance Sport Strategy* (Ottawa: Canadian Heritage, 2019).

<sup>98</sup> Canadian Centre for Ethics in Sport, "Mission and Vision" (last visited 01 September 2019), online: *CCES*, <[www.cces.ca/mission-and-vision](http://www.cces.ca/mission-and-vision)>. The CCES aims to achieve this mission by activating "a values-based and principle-driven sport system," advocating "for sport that is fair, safe and open," and protecting the integrity of sport.

<sup>99</sup> CCES, 2014 By-laws, *supra* note 72 at Art 4.01.

<sup>100</sup> E.g., the CCES can enter contracts to provide anti-doping services to entities like major event organizers.

<sup>101</sup> CADP, *supra* note 14 at 5.6.1.



established separately at the international level by international federations.”<sup>102</sup> Further, the CCES has obligations to WADA, such as providing WADA with its test distribution plan, and reporting all of its tests to WADA.<sup>103</sup> The CCES conducts its tests and investigations according to WADA standards, and uses only WADA-accredited labs to test the samples. The federal government has no say in any of these operational decisions, though, arguably, it implicitly supports them through its endorsement of anti-doping, funding of the CCES, and funding of the WADA.

Not only does the CCES have the power to select which athletes are part of the national registered testing pool, it can effectively investigate and prosecute anti-doping offences through the power conferred on it by the CADP.<sup>104</sup> Doping in sport is not considered criminal in Canadian law, but it is considered quasi-criminal in many jurisdictions.<sup>105</sup> Barnes notes, “The CCES also operates in conjunction with police authorities, so that investigation of a doping infraction may be preliminary to criminal

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<sup>102</sup> *Ibid* at p 74.

<sup>103</sup> *Ibid* at 5.4, 14.5; See also World Anti-Doping Agency, *World Anti-Doping Code International Standards: Testing and Investigations* (Montreal: WADA, January 2017) [WADA ISTI]. The test distribution plan details start at p 28. One of the principles is that the plan needs to be proportional.

<sup>104</sup> CADP, *supra* note 14 at 4.1. It is perhaps a bit odd that the CCES has the power to write the CADP and designate itself the investigator and prosecutor of anti-doping offences.

<sup>105</sup> The U.S. is one jurisdiction that has taken steps toward criminalizing doping in sports. See e.g., Rebecca Ruiz, “U.S. Lawmakers Seek to Criminalize Doping in Global Competitions,” *The New York Times* (12 June 2018), online: *New York Times* <[www.nytimes.com/2018/06/12/sports/american-doping-criminal-law.html](http://www.nytimes.com/2018/06/12/sports/american-doping-criminal-law.html)>. Australia, France, and Italy have criminalized doping in sports, but the United Kingdom has confirmed it will not criminalize doping. See “Doping Will Not Be a Criminal Offence, Sports Minister Tracey Crouch Says,” *ITV News* (24 October 2017), online: *ITV*, <[www.itv.com/news/2017-10-24/doping-will-not-be-a-criminal-offence-sports-minister-tracey-crouch-says/](http://www.itv.com/news/2017-10-24/doping-will-not-be-a-criminal-offence-sports-minister-tracey-crouch-says/)>. In 1993, the CCDS did not want doping criminalized. See House of Commons. Legislative Committee on Bill C-85, an Act Respecting the Control of Psychoactive Substances and their Precursors and to Amend the Criminal Code, the Food and Drugs Act and the Proceeds of Crime (Money Laundering) Act and Repeal the Narcotic Control Act in Consequence Thereof. *Evidence*. 34-3, vol 1, no 1-6 (25 May 1993) at 16:35 (pp 2:28-2:29) (Leonora Kung), online: *Canadian Parliamentary Historical Resources*, <[parl.canadiana.ca/view/oop.com\\_HOC\\_3403\\_87\\_1/81?r=0&s=1](http://parl.canadiana.ca/view/oop.com_HOC_3403_87_1/81?r=0&s=1)>. See also Rachele Downie, “Improving the Performance of Sport’s Ultimate Umpire: Reforming the Governance of the Court of Arbitration For Sport” (2011) 12:2 *Melbourne J Intl L* 315 at 330; Steffi Jose, “From Sport’s Kangaroo Court to Supreme Court: How the Court of Arbitration for Sport Can Legitimize Anti-Doping Law” (2014) 21 *SW J Intl L* 401.

prosecution.”<sup>106</sup> Criminal prosecutions are covered by the *Charter* and some of the provisions in the *Charter* that protect individual rights in the criminal prosecution process—such as the presumption of innocence—are also engaged by some of the provisions in the CADP.<sup>107</sup> The investigative power of the CCES, both on its own and in conjunction with police, and its obligation to cooperate in international anti-doping investigations (i.e., those conducted or initiated by WADA or other NADOs) shows that the CCES’s powers extend beyond merely taking samples and notifying individuals of their results.

An indication of the amount of control required to meet the government actor threshold in a sports context is shown in *Sagen*. The plaintiffs in this case successfully argued at the B.C. Supreme Court that government had control over VANOC’s operational activities because of heavy government involvement (at the federal, provincial, and municipal levels) in planning, organizing, and financing the 2010 Olympic Games.<sup>108</sup> Not only did the plaintiffs have multiple examples where VANOC admitted it was controlled by government,<sup>109</sup> they also cited examples of government control over VANOC’s governance because it controlled its purpose, bylaws, and composition of the board.<sup>110</sup> Examples of operational control included the government’s right to negotiate, vet, and approve all contracts relating to construction and venues.<sup>111</sup>

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<sup>106</sup> John Barnes, *Sports and the Law in Canada*, 3rd ed (Toronto: Butterworths, 1996) at 103. This source predates the WADC by nearly a decade, so does not carry much persuasive weight, but Barnes in *The Law of Hockey* (Toronto: LexisNexis, 2010) at 229 repeats this point and argues the *Charter* applies to anti-doping violations and the associated procedures of sports organizations.

<sup>107</sup> This is discussed further in Chapter 4.7.

<sup>108</sup> *Sagen v Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, 2009 BCSC 942, (Plaintiffs’ Memorandum of Argument) at paras 213-221 [*Sagen Memo*].

<sup>109</sup> *Ibid* at paras 193-200.

<sup>110</sup> *Ibid* at para 208.

<sup>111</sup> *Ibid* at para 216.

Examples of financial control include the fact that the government provided all of VANOC's financial capital as well as a portion of its operating budget, and had the right to review and approve the business plan and budget.<sup>112</sup>

The examples in *Sagen* detail a much higher level of government influence over operational decisions compared to the near absence of government involvement in the operation of the CCES, and yet the B.C. Court of Appeal determined that despite heavy control by government, selection of Olympic events was still not subject to the *Charter* or under the control of VANOC. Margot Young explains that the BCCA did not say that the *Charter* did not apply to VANOC, but rather took a very strict interpretation of event selection, looking at it in terms of who had powers over determining what sports will be contested at the Olympics compared to "hosting" the Olympics.<sup>113</sup> This indicates that the test for government control over an entity is very stringent.

Control over the day-to-day operations is a significant factor in determining whether or not the entity in question is controlled by government to the extent of being an arm of government, such as the power or ability negotiate and approve contracts.<sup>114</sup> While there is a long history of government involvement in anti-doping, that government action is removed from the day-to-day operational level. Even Canada's first anti-doping policies required NSOs to develop and implement their own anti-doping plans; they did not tell NSOs (or the SMCC) how to do tests, when to do tests, or who to test. That distance from operational control has remained constant throughout various iterations of Canada's anti-doping programs, including the 2015 CADP. The lack of government

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<sup>112</sup> *Ibid* at paras 224-225.

<sup>113</sup> Margot Young, "The IOC Made Me Do It: Women's Ski Jumping, VANOC and the 2010 Winter Olympics" (2010) 18:3 Const Forum Const 95.

<sup>114</sup> *Sagen* Memo, *supra* note 108, *Douglas College*, *supra* note 57.

involvement in the functional operation of anti-doping does not meet the minimum threshold required by the control test to engage *Charter* oversight of the CCES.

iv. Conclusion on the CCES as a Government Actor

Canada has mandated compliance with anti-doping without specifying how anti-doping should be administered by the body to whom that responsibility has been delegated. It is unlikely the CCES meets the threshold required by the *McKinney* control test. There is no evidence that government has any control over its governance or operational decision-making, and as proven in cases like *McKinney*, the fact that the government supplies nearly three-quarters of the CCES's budget is not enough to determine that the CCES is a government actor.

c. The Test for *Charter* Application: Government Action

Administering the CADP is a major part of what the CCES does, but it is not the only element of the CCES's business. The analysis in this section focuses on whether or not the CADP amounts to a specific government program or policy to the extent that it constitutes a government action and as such, the *Charter* is engaged.

If the actor does not meet the test for government, the *Charter* may apply to the action "if government retains that responsibility for it."<sup>115</sup> This was determined in

*Eldridge*. In this case, the Supreme Court held:

[A]n entity may be found to attract Charter scrutiny with respect to a particular activity that can be ascribed to government. *This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself.* In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor.<sup>116</sup>

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<sup>115</sup> *Eldridge*, *supra* note 2 at para 42.

<sup>116</sup> *Ibid* at para 44 (emphasis added).

In *Eldridge*, one of the questions the Supreme Court addressed was whether the *Charter* applied to hospitals. The defendants relied on *Stoffman* to argue that it did *not* apply to hospitals; however, the Supreme Court distinguished *Stoffman* on the basis that *Stoffman* was about hospitals implementing private activities (like mandatory retirement), whereas *Eldridge* was about hospitals implementing government policy by providing insured medical services.<sup>117</sup> Hospitals had not been considered government actors on the basis they were private legal entities and thus the *Charter* would not apply to actions adopted by their own initiative;<sup>118</sup> however, hospital actions taken when carrying out a specific government policy objective were subject to the *Charter*.

The Supreme Court concluded that the Medical Services Commission and hospitals delivered a service that was a specific government policy, that is, providing insured health care services to British Columbians, and thus the *Charter* applied to their decisions in delivering these services. Despite hospitals not being an arm of government, their actions in providing insured health care services were considered a government action because it met the “ascribed activity” threshold. In particular, hospitals carried out a specific government objective under the *Hospital Insurance Act*.<sup>119</sup> Under the *Hospital Insurance Act*, government was “responsible for defining both the content of the service to be delivered and the persons entitled to receive it.”<sup>120</sup> Hospitals were “merely the vehicle the legislature has chosen to deliver this program [of providing insured medical services].”<sup>121</sup>

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<sup>117</sup> *Ibid* at para 46.

<sup>118</sup> *Stoffman*, *supra* note 54 at 516.

<sup>119</sup> *Hospital Insurance Act*, RSBC 1996, c 204.

<sup>120</sup> *Eldridge*, *supra* note 2 at para 49.

<sup>121</sup> *Ibid* at para 50.

The Court in *Eldridge* does not elaborate on any factors that could help elucidate whether or not an act is governmental, other than reiterating the point from *McKinney* that an entity attracts *Charter* scrutiny if the actions it performs are “in furtherance of a specific governmental program or policy.”<sup>122</sup> The entity must be doing more than providing a “public function.”<sup>123</sup> It must be “implementing a *specific* governmental policy or program.”<sup>124</sup> Counsel for Sagen et al., giving examples from *Eldridge*, *Desrochers*, and *Toronto Transit Commission*, point out that it is “irrelevant” how government takes on an activity; it can be done through legislation, contract, or departmental initiative.<sup>125</sup>

In order to determine whether or not an activity is subject to the *Charter*, the inquiry focuses “not on the nature of the entity whose activity is impugned, but rather into the nature of the activity itself.”<sup>126</sup> While the Supreme Court declined to list any factors that could help with this analysis, it can entail looking at factors such as (in the case of *Sagen*) who (the government, the organization committee, or the IOC) directs the responsibilities and details of hosting and organizing the Olympic Games compared to general oversight of the event.<sup>127</sup> *Eldridge*, *Sagen* and *Pridgen*<sup>128</sup> indicate that the specific

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<sup>122</sup> *Ibid* at para 42.

<sup>123</sup> *Ibid* at para 43.

<sup>124</sup> *Ibid*.

<sup>125</sup> *Sagen* Memo, *supra* note 108 at para 246, citing *Eldridge*, *supra* note 2, *Desrochers v Canada (Industry)*, 2009 SCC 8, [2009] 1 SCR 194, and *Toronto Transit Commission v Amalgamated Transit Union Local 113*, 2004 CanLII 55085 (Ont LA).

<sup>126</sup> *Eldridge*, *supra* note 2 at para 44.

<sup>127</sup> *Sagen* Memo, *supra* note 108 at paras 254-256.

<sup>128</sup> In *Pridgen*, *supra* note 51, the chambers judge found the *Charter* applied to the University of Calgary because it implemented a specific government policy through its actions in providing post-secondary education. How it “dictated the terms upon which a student may receive an education at a public institution” (including discipline) was subject to the *Charter* because it directly affected how the university implemented a specific government policy. See *Pridgen* at para 63, quoting the Chambers decision at paras 67 & 102. The Alberta Court of Appeal did not overturn that finding, but instead analyzed whether or not the university imposing disciplinary sanctions engaged the *Charter* under the statutory compulsion framework (para 105). Hiring and firing staff was not necessarily subject to the *Charter*, but restricting

ways an entity implements a government policy—by statutory compulsion, contract or otherwise—can help determine whether or not the *Charter* applies to actions taken by non-government actors, *and* that there needs to be a nexus between the government policy and the entity’s conduct in implementing it.

#### d. Applying the Test: Is the CADP a Government Action?

The CCES is, arguably, not a government actor, but is the CADP a government action? Large swaths of the CADP are adopted verbatim from the WADC, and the WADC binds national anti-doping organizations—including the CCES as Canada’s NADO—and through them, national sport organizations and athletes. Canada has demonstrated international commitment and endorsement of the WADC through its formal acceptance of the UNESCO Convention Against Doping in Sport.<sup>129</sup> The CADP is not written by government; it neither binds governments, nor do governments administer or enforce it; technically, it is authored and administered by the CCES without any official government input. But, the CADP is recognized and endorsed by government policies such as the *Canadian Policy Against Doping in Sport—2011*,<sup>130</sup> and complying with it is a requirement of many Sport Canada programs.

Factors such as Sport Canada programs (like those discussed below, including the Athlete Assistance Program) that require adoption of the CADP, Government of Canada policies (like the Canadian Sport Policy 2012) that endorse the CADP, the government’s emphasis on its historical leadership in developing and promoting anti-doping policies,

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students’ rights (like freedom of expression) through disciplinary measures was because it interfered with the students’ ability to pursue post-secondary education under the PSL Act.

<sup>129</sup> UNESCO Convention, *supra* note 66.

<sup>130</sup> The language the CPADS-2011 uses is “supports the effective Canadian implementation of the CADP.” See CPADS-2011, *supra* note 64 at 5.

and the designation of the CCES as Canada's national anti-doping organization suggest that the CADP is a government action worthy of *Charter* application.<sup>131</sup>

This section looks at specific government programs that require compliance with the CADP and policies that endorse the CADP to determine whether or not the *Charter* applies to the CADP as a government action. Remember, Arbitrator McLaren in *Adams 2006* concluded the CADP rules were not “part of a comprehensive government program under the overall control of the government,” that the governments neither controls the CADP nor the actions of the CCES, and that “the CADP Rules are the result of international collaboration,” and he characterized the CADP rules as a contractual obligation that “must be complied with in order to uphold contractual obligations relating to voluntary participation in privately sanctioned sporting events.”<sup>132</sup> In contrast to McLaren's judgement in *Adams 2006*, this section attempts to illustrate government action by showcasing how the CADP furthers specific governmental programs or policies and thus earns *Charter* protection.

i. Preamble to Set the Context of the CADP with Respect to Governmental Programs or Policies

As discussed in Chapter 1, government has a long and continuing historical involvement in anti-doping in sports domestically and internationally. Sport Canada recognizes the role that government has played historically, and continues to play: “Sport Canada's active involvement in ethics in sport began in the 1980's through its extensive and internationally recognized leadership on the issue of doping in sport.”<sup>133</sup> This leadership,

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<sup>131</sup> The CCES is named in the CPADS-2011 as Canada's national anti-doping agency, and recognized by the WADA as Canada's NADO.

<sup>132</sup> *Adams 2006*, *supra* note 39 at para 162.

<sup>133</sup> SCSES 2010, *supra* note 67 at 1.



according to Sport Canada, has been demonstrated by Canada’s international commitments to anti-doping such as signing and ratifying the *Council of Europe Anti-Doping Convention* (1996), being a state party of the UNESCO Convention, hosting the WADA headquarters in Montreal, and “remaining actively involved in anti-doping through the *Canadian Policy Against Doping in Sport*.”<sup>134</sup>

In *Sagen*, the B.C. Supreme Court found that “delivering services that are truly governmental in nature under a contract” was sufficient to trigger *Charter* protection.<sup>135</sup> In the Government of Canada’s Public Accounts, funding for the CCES is found in the section titled “Contractual Obligations.”<sup>136</sup> The CCES delivers a service—the CADP—that functions as a government activity based on the role of sport in Canadian society, the role of government in sport generally, as well as the role of government in Canadian high-performance sport. Even though the B.C. Court of Appeal disagreed with the B.C. Supreme Court on some issues in *Sagen*, the Court of Appeal noted that, “deliberately and formally adopted policies of government may constitute ‘law’ notwithstanding that they are embodied in contractual documents rather in legislative acts or statutory instruments.”<sup>137</sup> The CADP is Canada’s WADC-compliant anti-doping program, which has been embraced by the government in the CPADS-2011, and the WADC has been formally adopted by Canada through the UNESCO Convention. These instruments, despite not being embedded in statute, are formal policies of government, meaning that they are government actions attracting *Charter* protection.

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<sup>134</sup> *Ibid* at 2.

<sup>135</sup> *Sagen v Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, 2009 BCSC 942 at paras 70-73, 98 BCLR (4th) 109 (CanLII).

<sup>136</sup> Government of Canada, *Public Accounts*, *supra* note 86 at Table 11.3.

<sup>137</sup> *Sagen v Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, 2009 BCCA 522 at para 60, 98 BCLR (4th) 141 (CanLII).

There are several ways in which the CADP furthers a specific governmental program or policy, including the CPADS-2011,<sup>138</sup> the Sport Support Program,<sup>139</sup> the Athlete Assistance Program (AAP),<sup>140</sup> and the Sport Funding and Accountability Framework (SFAF), the *Canadian Sport Policy 2012*,<sup>141</sup> the *Sport Canada Strategy on Ethical Sport 2010*,<sup>142</sup> and others.<sup>143</sup> These policies and programs will be examined to determine if their endorsement of and compliance with the CADP equals government action. John Barnes argues that, “Governmental nexus can be found in the directive force of Sport Canada’s policies, in the conditions of funding of athletes and NSOs and in the system of sanctions.”<sup>144</sup> Another nexus is pointed out by a CCES employee, quoted by Ritchie and Jackson: “The Canadian Policy [Against Doping in Sport] refers explicitly to the CADP and the CADP refers explicitly to the Policy and they’re certainly meant to be read together. ... so you’ve got a public sector policy complemented by, in effect ... private sector detailed rules in the sport world.”<sup>145</sup> Neither of these sources, however, completes a full *Eldridge* analysis of the CADP that looks at the CADP with respect to various government programs and policies to test the strength of the nexus between the CADP and government.

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<sup>138</sup> CPADS-2011, *supra* note 64

<sup>139</sup> SSP, *supra* note 67.

<sup>140</sup> AAP, *supra* note 67

<sup>141</sup> Government of Canada, *Canadian Sport Policy 2012* (Ottawa: Canadian Heritage, 2012) [CSP 2012].

<sup>142</sup> SCSES 2010, *supra* note 67.

<sup>143</sup> Government of Canada, “Sport Funding and Accountability Framework” (Last modified 18 December 2018), online: *Canada*, <[www.canada.ca/en/canadian-heritage/services/funding/sport-support/accountability-framework.html](http://www.canada.ca/en/canadian-heritage/services/funding/sport-support/accountability-framework.html)>.

<sup>144</sup> Barnes 1996, *supra* note 106 at 103.

<sup>145</sup> Ian Ritchie & Greg Jackson, “Politics and ‘Shock’: Reactionary Anti-Doping Policies in Canadian and International Sport” (2014) 6:2 *Intl J Sport Policy & Politics* 195 at 207. The CCES employee was commenting on the 2004 Canadian Policy Against Doping in Sport and its connection to the CADP.

ii. UNESCO Convention Against Doping in Sport

Canada is a state party of the UNESCO *Convention Against Doping in Sport*. This Convention commits parties to “adopt appropriate measures at the national and international levels which are consistent with the principles of the [World Anti-Doping] Code.”<sup>146</sup> The definitions in the Convention “are to be understood within the context of the World Anti-Doping Code.”<sup>147</sup> Article 4.1 says: “In order to coordinate the implementation, at the national and international levels, of the fight against doping in sport, States Parties commit themselves to the principles of the Code as the basis for the measures provided for in Article 5 of this Convention.”<sup>148</sup> Article 5 indicates how state parties may meet their commitments: “In abiding by the obligations contained in this Convention, each State Party undertakes to adopt appropriate measures. Such measures may include legislation, regulation, policies or administrative practices.”<sup>149</sup> Article 14 says, “States Parties undertake to support the important mission of the World Anti-Doping Agency in the international fight against doping.” Further, the Prohibited List and the Standards for Granting Therapeutic Use Exemptions are annexed to the Convention; Annexes are “an integral part of this Convention.”<sup>150</sup>

International conventions, including the UNESCO Convention, have legal effect in Canada when they have been “transformed” or “implemented through a domestic law-

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<sup>146</sup> UNESCO Convention, *supra* note 66 at Art 3(a).

<sup>147</sup> *Ibid* at Art 2.

<sup>148</sup> *Ibid*.

<sup>149</sup> *Ibid* at Art 5.

<sup>150</sup> *Ibid* at Art 4.3.

making process.”<sup>151</sup> This is “usually” done through legislation.<sup>152</sup> There is no legislation implementing the UNESCO Convention into Canadian law, but Canada has accepted the Convention, which has the same legal effect as ratification.<sup>153</sup> The Convention has been discussed in the House of Commons and amendments to it have been formally tabled in the House. For example, on 17 October 2018, Andrew Leslie, Parliamentary Secretary to the Minister of Foreign Affairs, tabled amendments to the Convention.<sup>154</sup> In April and May 2008, Parliamentarians debated and passed a motion to encourage more nations to ratify the Convention.<sup>155</sup> In his comments on the motion, Conservative MP Gary Schellenberger said:

State parties to the UNESCO International Convention against Doping in Sport have agreed to undertake measures such as legislation, regulation, policies or administrative practices to fight doping in sport. The Canadian policy against doping in sport and the Canadian anti-doping program is consistent with the objectives of the UNESCO convention.<sup>156</sup>

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<sup>151</sup> John Currie, *Public International Law*, 2nd ed (Toronto: Irwin Law, 2008) at 260. See also Laura Barnett, “Canada’s Approach to the Treaty-Making Process” (24 November 2011, last revised on 05 August 2018) at 3.3.1, online: *Library of Parliament*, <lop.parl.ca/sites/PublicWebsite/default/en\_CA/ResearchPublications/200845E>: “Cabinet prepares an Order in Council authorizing the Minister of Foreign Affairs to sign an Instrument of Ratification or Accession. Once this instrument is deposited with the appropriate authority, the treaty is officially ratified. At this point, Canada is bound by the treaty as soon as it comes into force (if it is not already in force).”

<sup>152</sup> Currie, *supra* note 151 at 260.

<sup>153</sup> “Acceptance” has the same legal effect as ratification according to the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155, I18232 UNTS 331 (entered into force 27 January 1980) at Arts 2(1)(b) & 14(2); see also United Nations Treaty Collection, “Glossary” (last visited 17 September 2019), online: *UN Treaty Collection*, <treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1\_en.xml>.

UNESCO says, “A ‘State Party’ to the International Convention against Doping in Sport is a country that has ratified, accepted, approved or acceded to this international instrument, and is therefore legally bound by its provisions.” Canada is not the only country to have accepted rather than ratify the Convention. See UNESCO, “International Convention against Doping in Sport: States Parties” (last visited 23 September 2019), online: *UNESCO*, <www.unesco.org/new/en/social-and-human-sciences/themes/anti-doping/international-convention-against-doping-in-sport/states-parties/>. For a discussion on unimplemented treaty obligations have been treated in Canadian Law, see Currie, *supra* note 151 at 254-61.

<sup>154</sup> *House of Commons Debates*, 42-1, Vol 148, No 336 (17 October 2018) at 15:05 (Andrew Leslie). Previous amendments have also been tabled in the House of Commons. See e.g., *House of Commons Debates*, 42-1, Vol 148, No 100 (28 October 2016) at 12:06 (Pam Goldsmith-Jones).

<sup>155</sup> The choice of the word “ratify” here is a bit confusing because Canada has not ratified the Convention, but rather accepted it.

<sup>156</sup> *House of Commons Debates*, 39-2, No 74 (8 April 2008) at 18:00 (Gary Schellenberger). The motion was successful carried on 7 May 2008. See *House of Commons Debates*, 39-2, No 90 (7 May 2008).

The Convention is also named in the CPADS-2011, which states, “Any updates to guiding documents, notably including the UNESCO Convention, will be considered to be automatically incorporated into this policy and its implementation.”<sup>157</sup>

International conventions adopted in Canada need to comply with the Canadian constitution, including the *Charter*.<sup>158</sup> John Currie points to *Slaight Communications* to assert that “human rights treaties to which Canada is a party should be taken to express the minimum content of corresponding rights guaranteed in the *Charter*.”<sup>159</sup> The UNESCO Convention is an integral part of anti-doping in Canada, committing the federal and provincial/territorial governments through its integration into the CPADS-2011. State parties to the Convention are legally bound to follow its provisions—something that Canada has done through CPADS-2011, its support of WADA and the CCES, and through requiring athletes and NSOs to comply with the CADP as a condition of funding.

### iii. Canadian Policy Against Doping in Sport—2011

The *Canadian Policy Against Doping in Sport—2011* is the federal government’s most recent written policy committing the federal government and provincial/territorial

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<sup>157</sup> CPADS-2011, *supra* note 64 at 5.

<sup>158</sup> An example of an international convention that raises many questions in terms of how its adoption into Canadian law will work in practice when considering constitutional rights is the *United Nations Declaration of the Rights of Indigenous Peoples*, UNGA Res 61/295, UNGA, 61st Sess, UN Doc A/RES/61/295 (2007) [UNDRIP]. In May 2016, Carolyn Bennett announced that Canada officially adopted UNDRIP and removed its objector status, saying “We intend nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution.” See Carolyn Bennett, “Speech Delivered at the United Nations Permanent Forum on Indigenous Issues, New York, May 10” (delivered at the UN Permanent Forum on Indigenous Issues, New York City, 10 May 2016), online: *Canada*, <[www.canada.ca/en/indigenous-northern-affairs/news/2016/05/speech-delivered-at-the-united-nations-permanent-forum-on-indigenous-issues-new-york-may-10-.html](http://www.canada.ca/en/indigenous-northern-affairs/news/2016/05/speech-delivered-at-the-united-nations-permanent-forum-on-indigenous-issues-new-york-may-10-.html)>. One of the issues raised in terms of implementing UNDRIP in Canada is how it fits into s 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11. See James Wilt, “Implementing UNDRIP is a Big Deal for Canada. Here’s What You Need to Know,” *The Narwhal*, (12 December 2017), online: *Narwhal*, <[thenarwhal.ca/implementing-undrip-big-deal-canada-here-s-what-you-need-know/](http://thenarwhal.ca/implementing-undrip-big-deal-canada-here-s-what-you-need-know/)>.

<sup>159</sup> John Currie, *supra* note 151 at 284. He quotes *Slaight Communications*, *supra* note 11 at 1038: “the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.”

governments to fighting doping in sports.<sup>160</sup> It lists the following among the roles for the federal government:

- “international anti-doping leadership and engagement”
- “funding of the [World Anti-Doping] Code-compliant Canadian Anti-Doping Program (CADP), administered by the Canadian Centre for Ethics in Sport,”; and
- “leadership and program delivery, including through the use of funding sanctions, which reinforce doping-free Canadian Sport.”<sup>161</sup>

These roles show that the federal government is committed to engaging (and remaining engaged) with anti-doping at the domestic and international level. The federal government is not merely a passive funder of anti-doping in Canada, but rather is an active player in helping the fight against doping in sports.

The CPADS-2011 also endorses the WADC. For example, it implements the definition of “doping” from the WADC into the policy: “Doping is considered to be the use of substances or methods which are prohibited by the [World Anti-Doping] Code. Specifically, WADA states that doping is the occurrence of one or more anti-doping rule violations as set out in Section 2 of the Code.”<sup>162</sup> Although the WADC itself does not bind governments, Canada, through the CPADS-2011, commits itself to following the Code as it is administered in Canada by the CCES: “Governments meet their [UNESCO] Convention requirements through intergovernmental coordination and work with the Nation’s NADO and other sport sector organizations, typically via a combination of funding, programming and leadership.”<sup>163</sup> The combination of funding, programming, and leadership can be seen through Sport Canada programs (like the Sport Support

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<sup>160</sup> CPADS-2011, *supra* note 64 at 5. No updated CPADS has been released since 2011, though the online version was last modified on 31 October 2017.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid* at 8. Funding includes providing funding to the CCES and WADA.

Program, discussed next) explicitly requiring CADP compliance, and making funding dependent on CADP adoption and endorsement.<sup>164</sup>

#### iv. Sport Support Program

The Sport Support Program (SSP) is an umbrella program administered by Sport Canada that provides funding to “eligible organizations for programming that supports the goals of the *Canadian Sport Policy*.”<sup>165</sup> Two other programs that form part of the SSP are the Athlete Assistance Program and the Sport Funding and Accountability Framework. Only organizations that meet the Sport Funding and Accountability Framework may apply to the SSP.

One of the four listed objectives of the SSP is to “advance Canadian interests, values and ethics in sport at home and abroad.”<sup>166</sup> Funding from the SSP requires participants to adopt and endorse the CADP.<sup>167</sup> Funding from the SSP is not available to

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<sup>164</sup> The CPADS-2011 has a specific definition of funding, which designates financial support to be used for anti-doping. CPADS-2011, *supra* note 64 at 7: “Funding—in the context of this policy—refers to the funding programs delivered by Federal-Provincial/Territorial sport branches. This may include both direct and indirect support, where direct funding is designated for anti-doping activities, and indirect funding is not earmarked for anti-doping but the funding provisions reinforce the importance of anti-doping.” I was unable to find any information on how is funding is received under the CPADS-2011, to whom it is given, and the required accountability measures related to making sure it is used for anti-doping. This money may be part of the \$6 million of government funding for the CCES, or it may be part of the money distributed through programs like the Sport Support Program to NSOs. However, NSOs such as Nordiq Canada and Alpine Canada do not have any information in their annual audited financial statements relating to drug testing or anti-doping. See e.g., Cross-Country Ski de Fond Canada, *Financial Statements* (31 March 2018), online: *Cross Country Canada* <[www.ccski.com/getmedia/29500d5b-2857-4047-a4a1-1f7b6e02a5d9/201803-Financial-Statements-Approved-by-Board.pdf.aspx](http://www.ccski.com/getmedia/29500d5b-2857-4047-a4a1-1f7b6e02a5d9/201803-Financial-Statements-Approved-by-Board.pdf.aspx)>; Alpine Canada, *Financial Statements* (30 April 2018), online: *Alpine Canada*, <[alpinecanada.org/uploads/documents/2018\\_Audited\\_YEFS.pdf](http://alpinecanada.org/uploads/documents/2018_Audited_YEFS.pdf)>. Similarly, provincial sport organizations do not have that information. See e.g., BC Amateur Athletics Association, *Financial Statements for the Year Ended March 31, 2018* (25 July 2018), online: *BC Athletics*, <[www.bcathletics.org/admin/js/elfinder/files/2018%20AGM/2018%20Reports/7.1%20-%20Audit%202017-2018.pdf](http://www.bcathletics.org/admin/js/elfinder/files/2018%20AGM/2018%20Reports/7.1%20-%20Audit%202017-2018.pdf)>. As of 30 October 2019, the federal government had not replied to my query about this. Jeremy Luke at the CCES told me via phone conversation that the CCES has no control or input into how CPADS funding is distributed, monitored, etc., but suggested it may be through the accountability measures in programs like the Sport Funding and Accountability Framework.

<sup>165</sup> SSP, *supra* note 67.

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*

be used for any expenses the organization or program may incur, but anti-doping services are explicitly listed as an eligible expense for which SSP funding can be used.<sup>168</sup>

Sport Canada will not provide any funding to organizations through the SSP unless they adopt and endorse the CADP. In addition, while Sport Canada does not have complete control over how organizations spend their SSP money, enumerating anti-doping as a specific allowable expense shows how the government, through this funding, takes action to ensure that the CADP is complied with by any organization receiving SSP funding, because it dictates that at least a portion of the funding received must go to anti-doping.

#### v. Athlete Assistance Program

The Athlete Assistance Program (AAP), also known as carding, is a monthly grant program that supports national- and international-level athletes who compete for Canada. This program, run by Sport Canada, funds more than 1,800 athletes across more than 80 different sports.<sup>169</sup> Its purpose is to support high-performance athletes with the aim of contributing “toward improved Canadian performances at major international sporting events such as the Olympic/Paralympic Games and World Championships.”<sup>170</sup> The AAP does this by helping athletes cover living, training, and tuition expenses. The AAP is a key part of Canadian sport policy, furthering the national and international goals of the Canadian government through achievement in sport.

In order for an athlete to receive carding, they must sign an agreement with Sport Canada. One of the obligations of that agreement is to comply with the CADP, and to

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<sup>168</sup> *Ibid.* Examples of ineligible expenses for organizations receiving SSP funding include capital costs, awards to athletes, and personal items.

<sup>169</sup> AAP, *supra* note 67 at 1-1.

<sup>170</sup> *Ibid.*



complete the CCES’s anti-doping education module at the start of each carding cycle.<sup>171</sup> Athletes may not be eligible to receive carding if they “have been ruled ineligible to participate in sport for two years or more as a result of an anti-doping rule violation, and who have not, in the case of pre-2004 violations, subsequently been reinstated,” or if the athlete is “serving an anti-doping rule violation sanction of less than two years of sport ineligibility at the start of the carding cycle.”<sup>172</sup>

The AAP compels individual athletes to comply with the CADP. Funding is contingent on athletes completing anti-doping training annually, and any athlete who has been ineligible as the result of an anti-doping rule violation cannot receive carding. While national sport organizations nominate the athletes for carding, Sport Canada sets the minimum criteria to receive funding. The fact that eligibility to receive carding depends on compliance with the CADP shows one way in which Sport Canada and the federal government play an active role in integrating the CADP into Canadian sport.

#### vi. Sport Funding and Accountability Framework

The Sport Funding and Accountability Framework (SFAF) is a program that funds national sports organizations.<sup>173</sup> In order to receive funding through the SFAF, NSOs must adopt the CADP.

Like the AAP, funding for NSOs also elucidates how the federal government uses sport to achieve policy objectives, because in order to receive funding:

[N]ational sport and multi-sport/service organizations had to indicate their achievements and specific program objectives as well as how these aligned with larger social policy objectives established by government with respect

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<sup>171</sup> *Ibid* at 3-2.

<sup>172</sup> *Ibid*.

<sup>173</sup> As of December 18, 2018, Sport Canada is no longer accepting applications under the SFAF because Sport Canada is in the process of developing a new funding framework. Eligibility requirements are no longer available on the SFAF website.

to improving access and opportunity for underserved groups, an athlete-centred focus, harassment and abuse, athlete appeals, bilingual policies and anti-doping policies.<sup>174</sup>

One of the goals of the SFAF is to make organizations receiving funding from Sport Canada more accountable. In addition to making NSOs more transparent and accountable, the SFAF, according to Kikulis, represents “the shift in government to tie funding to specific public policy objectives enabling government to achieve these objectives through the work of external organizations”; this approach “makes it possible for government to adopt a co-ordinating or ‘steering’ role, shaping the direction or organizations that receive funds from this program.”<sup>175</sup> Despite the fact that NSOs are independent non-for-profit corporations,<sup>176</sup> like the CCES, government, through the SFAF, still plays a major role in determining how NSOs achieve their objectives, perhaps not unlike the CCES in fulfilling its anti-doping mandate.<sup>177</sup>

#### vii. The Canadian Sport Policy 2012

The Canadian Sport Policy 2012 (CSP 2012) is Canada’s 10-year plan for sport at all levels in Canada. The policy is intended for all levels of government in Canada, as well as “institutions and organizations that are committed to realizing the positive impacts of sport on individuals, communities and society.”<sup>178</sup> The CSP 2012 is seminal for Canadian sport because it “clearly addresses the complex nature of sport and the place it occupies

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<sup>174</sup> Lisa Kikulis, “Contemporary Policy Issues in High Performance Sport” in Lucie Thibault & Jean Harvey, eds, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013) 97 at 108.

<sup>175</sup> *Ibid* at 114.

<sup>176</sup> Like the CCES, NSOs may not attract *Charter* scrutiny for all of their actions or programs. See Hilary Findlay, *Sex Discrimination in Sport: An Update* (Ottawa: CAAWS, 2012) at 1.

<sup>177</sup> Charles Dubin, in his recommendations, noted the extremely close connection between the federal government and NSOs, and how the government was able to exert control over NSOs. See Dubin Commission, *supra* note 68 at 529-31.

<sup>178</sup> CSP 2012, *supra* note 141 at 2.

in Canadian society.”<sup>179</sup> It is the result of two years of consultations and engagement with Canadians on how they envision the future of sport in Canada.<sup>180</sup> The “foundational elements” of the five policy goals in the CSP are: “physical literacy, values and ethics, equity, access, inclusion and diversity.”<sup>181</sup> The CSP policy goals are:

- Canadians have the fundamental skills, knowledge and attitudes to participate in organized and unorganized sport.
- Canadians have the opportunity to participate in sport for fun, health, social interaction and relaxation.
- Canadians have the opportunity to systematically improve and measure their performance against others in competition in a safe and ethical manner.
- Canadians are systematically achieving world-class results at the highest levels of international competition through fair and ethical means.
- Sport is used as a tool for social and economic development, and the promotion of positive values at home and abroad.<sup>182</sup>

The policy vision of the CSP 2012 is “A dynamic and innovative culture that promotes and celebrates participation and excellence in sport.”<sup>183</sup> The very first policy principle listed is that sport-related policies and programs are values-based. The second objective for high-performance sport is that “Canadians are leaders internationally in the promotion of positive values, anti-doping and ethics in sport.”<sup>184</sup> The complementary outcome for high-performance sport is that “Canadians promote positive values, anti-doping and ethics in sport.”<sup>185</sup>

The CSP 2012 is a broad document, intended for governments and NSOs alike to be able to interpret and implement. It describes itself as a “roadmap.”<sup>186</sup> Despite the fact

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<sup>179</sup> Lucie Thibault & Jean Harvey, “The Evolution of Federal Sport Policy from 1960 to Today” in Lucie Thibault & Jean Harvey, eds, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013) 11 at 30.

<sup>180</sup> See e.g., *ibid* at 23-24, Table 1.3 for a list of the consultations and reports leading into the CSP 2012.

<sup>181</sup> *Ibid* at 30.

<sup>182</sup> CSP 2012, *supra* note 141 at 8.

<sup>183</sup> *Ibid* at 2.

<sup>184</sup> *Ibid* at 13.

<sup>185</sup> *Ibid* at 20.

<sup>186</sup> *Ibid* at 3.

that it does not explicitly mention the CADP, it does establish that sport in Canada is to be values-based, and high-performance sport is to be doping-free. The phrase “values-based sport,” coincidentally or not, is also a phrase used heavily by the CCES.<sup>187</sup> The CSP 2012, unlike other programs or policies, is deliberately designed to encompass all levels of sport and all Canadians. It does not focus solely on high performance sport or recreational sport. With its breadth of scope and emphasis on ethical sport embedded into the CSP 2012, the federal government once again demonstrates that doping-free is a specific objective it seeks to achieve for all Canadians in every level of sport.

#### viii. Sport Canada Strategy on Ethical Sport 2010

The purpose of the *Sport Canada Strategy on Ethical Sport* (SCSES) is “to define Sport Canada’s role in advancing and supporting ethical sport in Canada and abroad.”<sup>188</sup> In its definition of “ethical sport,” doping is listed as one of the behaviours that is “antithetical to the practice of ethical sport.”<sup>189</sup> This strategy commits Sport Canada to, among other obligations, “increase commitment and capacity amongst key partners to deliver ethical sport,”<sup>190</sup> and “Contribute to the collaborative efforts of the CCES,” as part of its aim to “Increase opportunities for key partners to coordinate the delivery of ethical sport to Canadians.”<sup>191</sup>

This SCSES lists the following as ways in which Sport Canada is involved in ethical sport through anti-doping:

- Revision of the Canadian Policy Against Doping in Sport

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<sup>187</sup> See e.g., CCES, “The Values Proposition: building a Stronger Canada through Values-Based Sport” (last visited 23 September 2019), online: CCES, <[www.cces.ca/values-proposition-building-stronger-canada-through-values-based-sport](http://www.cces.ca/values-proposition-building-stronger-canada-through-values-based-sport)>.

<sup>188</sup> SCSES 2010, *supra* note 67 at 1.

<sup>189</sup> *Ibid.*

<sup>190</sup> *Ibid* at 5, art 4.2.

<sup>191</sup> *Ibid* at 5, arts 4.3.1, 4.3.

- Support of CCES (education, testing result management, laboratory, research)
- Support of WADA
- UNESCO voluntary Fund
- Hosting requirements for international sport events
- Sanctions and requirements for anti-doping in Athlete Assistance Program<sup>192</sup>

These actions, separately and together, show distinct ways in which Sport Canada takes action through the CADP. For example, the CADP is endorsed by the CPADS-2011. Supporting CCES goes beyond just providing funding, but also supporting CCES in other ways. Likewise, supporting WADA goes beyond hosting the WADA headquarters in Canada, but encompasses adopting the WADC through the UNESCO Convention and the CPADS-2011. As mentioned in Chapter 2, one of the minimum requirements for hosting major events is that the CADP is implemented at those events.<sup>193</sup> Building anti-doping sanctions (like losing funding) into the AAP is another way that the CADP becomes an action of the government through the SCSES.

The SCSES envisions government involvement in the CADP through the actions listed above, and views anti-doping in sport as one element of ethical support that is supported and led by all levels of government.<sup>194</sup> In offering input to revisions CPADS-2011 and describing the CCES as a “key partner,” Sport Canada avoids a complete delegation of anti-doping to the CCES; the SCSES

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<sup>192</sup> *Ibid* at 7 (Appendix I).

<sup>193</sup> Government of Canada, *Federal Policy for Hosting International Events* (Effective 1 January 2008, last modified 31 October 2017) (Ottawa: Government of Canada, 2008) at s 6, online: *Canada*, <[www.canada.ca/en/canadian-heritage/services/sport-policies-acts-regulations/policy-hosting-international-sport-events.html](http://www.canada.ca/en/canadian-heritage/services/sport-policies-acts-regulations/policy-hosting-international-sport-events.html)>.

<sup>194</sup> SCSES 2010, *supra* note 67 at 2: “A recent evaluation of the True Sport Strategy reaffirmed the need for governments to provide leadership and support towards implementing this initiative.”

keeps the door open for government participation in the CADP and anti-doping more broadly through its support of WADA and the UNSECO Voluntary Fund.

ix. Conclusion on the CADP as a Government Action Based on Policies and Programs

There are several government policies that endorse the CADP, and programs that require compliance with the CADP. Hitching compliance with the CADP to funding for sports organizations and national athletes shows one way the government uses the CADP to take action against doping in sport.

Sport Canada provides millions of dollars to Canadian athletes and Canadian sport organizations annually. This funding comes with obligations to comply with the CADP. Making funding contingent on complying with the CADP shows anti-doping becomes a government action and demonstrates a measure of control over anti-doping by the conditions it attaches to funding, and through delegating anti-doping responsibilities to sport organizations and the CCES in exchange for government funding and support.

As the CSP 2012 acknowledges, “Governments have been involved in sport since the early part of the twentieth century because they recognize sport as a powerful means of enhancing society’s health and well-being.”<sup>195</sup> Collaboration between federal and provincial/territorial governments demonstrates “governments’ responsibility for articulating public policy.”<sup>196</sup> The CADP is an example of a program that the government uses to achieve a specific outcome: ethical, doping-free sport. Although the CADP is not written or administered by the Canadian government, there is a nexus between the CADP and government through the federal policies and programs requiring its adoption, as well

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<sup>195</sup> CSP 2012, *supra* note 141 at 2.

<sup>196</sup> *Ibid.*

as the CADP being the means by which the federal government meets its UNESCO Convention commitments.

## 5. Conclusion on *Charter* Application

Although the limited jurisprudence and arbitral decisions suggest otherwise, there are several factors found under a comprehensive *Eldridge* analysis that weigh in favour of the *Charter*'s application to the Canadian Anti-Doping Program, such as the existence of several government programs and policies that endorse the CADP or require compliance with the CADP. Performing a *McKinney* analysis on the CCES does not indicate that the CCES functions as an arm of government, and thus it is not subject to *Charter* scrutiny. That said, the applying *McKinney* to the CCES highlights the broad powers the CCES has in administering and enforcing the CADP, and helps to build the argument that the CADP furthers a specific government objective. The CCES may be a private entity, but its main purpose and preoccupation is the CADP, which is public.

The CADP itself states that it “complements the priorities of the Federal, Provincial and Territorial Governments”; this would be through policies such as the *Canadian Sport Policy 2012*, the *Canadian Policy Against Doping in Sport—2011*, and the UNESCO *Convention Against Doping in Sport*.<sup>197</sup> The CADP claims, “These documents, in addition to Canada hosting WADA in Montreal, Quebec, are reflective of a Canadian sport system fully committed to the advancement of values-based sport and the fight against doping in sport.”<sup>198</sup> Anti-doping, specifically the CADP, is embedded into the Canadian sport system and as such, earns *Charter* scrutiny. This argument is

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<sup>197</sup> CADP, *supra* note 14 at 6.

<sup>198</sup> *Ibid.*

supported by John Barnes, who says, “Given the government and statutory basis of doping control, it is also strongly arguable that the *Charter* applies to anti-doping violations and the associated procedures of sports organizations.”<sup>199</sup>

The totality of evidence, from programs and policies requiring CADP compliance—the UNESCO Convention, the CPADS-2011, the Sport Support Program, the Strategy on Ethical Sport, and others—to the breadth and scope of powers delegated to the CCES in its administration of the CADP (demonstrated through the *McKinney* analysis) indicates a nexus between government and anti-doping that supports the position that the CADP is a government action. Sport and anti-doping help government fulfil specific policy objectives; the CADP is a tool the government uses to achieve outcomes such as ethical sport and international leadership in anti-doping.

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<sup>199</sup> Barnes 2010, *supra* note 106 at 129. Barnes goes on to say, “the legal rights in sections 7 and 8 are particularly relevant, as is the guarantee of equality in section 15.” Barnes disputes Arbitrator McLaren’s characterization in *Adams 2006*, *supra* note 39 of anti-doping as a contractual agreement, and points out the SDRCC is not a court of competent jurisdiction for the purpose of enforcing *Charter* rights under s 24 of the *Charter*.



# Chapter 4: *Charter* Rights and Freedoms at Stake in the CADP

## 1. Introduction

Although the target of the CADP may seem to be elite athletes—those competing for Canada at international events and the Olympics—anti-doping affects all levels of athletes. It may be that what captures the public’s attention with respect to anti-doping is not how it affects the day-to-day life of full-time athletes, but rather, the seemingly disproportional effect it can have for unintended anti-doping rule violations. For example, when a 90-year-old cyclist tested positive for an anabolic steroid after eating beef liver, which was proved to have been the result of contaminated beef, a headline read, “In shaming 90-year-old rider, anti-doping earns a black eye.”<sup>1</sup> Mountain bikers were quick to support a rider who was banned from competition for 90 days after a positive drug test for an antibiotic taken to save his leg.<sup>2</sup> Anti-doping rules also faced criticism after a blind triathlete was banned from competing after his guide tested positive for a banned substance; the Paralympian had never tested positive for a banned substance, and the event at which his guide tested positive was not an event where he was participating as a

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<sup>1</sup> John Leicester, “In Shaming 90-Year-Old Rider, Anti-Doping Earns a Black Eye,” *Associated Press* (9 January 2019), online: *AP News*, <[apnews.com/8d6d024054db45b89ab3f8b422558c73?fbclid=IwAR0qfiqQzLfyPT02S2YR7aIm4-Ciji5RjIYyVPg\\_jw85LXgnUmNOeSNQRko](https://apnews.com/8d6d024054db45b89ab3f8b422558c73?fbclid=IwAR0qfiqQzLfyPT02S2YR7aIm4-Ciji5RjIYyVPg_jw85LXgnUmNOeSNQRko)>.

<sup>2</sup> Belgian racer Martin Maes tested positive for probenecid, an antibiotic that is banned because it is a masking agent. Maes was prescribed the drug because an injury he received racing became infected. Maes apparently asked the doctor who prescribed the drug whether or not it was banned, but did not follow up himself to confirm the legality of the drug. His retroactive application for a TUE was denied. See James Smurthwaite, “Interview: Martin Maes—‘I’m Not Guilty ... I Just Made a Stupid Mistake’” (27 June 2019), online: *Pink Bike*, <[www.pinkbike.com/news/interview-martin-maes-ews-failed-drug-test-im-not-guilty-i-just-made-a-stupid-mistake.html](http://www.pinkbike.com/news/interview-martin-maes-ews-failed-drug-test-im-not-guilty-i-just-made-a-stupid-mistake.html)>.

guide.<sup>3</sup> Critics of the World Anti-Doping Code question the effectiveness of the regime, asking if it fails to stop doping, do the ends, in terms of rights violations, justify the means.<sup>4</sup> Issues like these raise questions about how the CADP may infringe *Charter* rights, and lead to the question of whether or not such infringements are demonstrably justifiable in a free and democratic society.

This chapter first introduces the rights at stake generally, before explaining how and why any *Charter* violation must be justified under s 1. This includes a discussion on the objectives behind anti-doping, to help set the framework for the s 1 analyses used throughout the chapter with respect to specific *Charter* infringements. Then, each potential *Charter* violation is discussed in terms of which *Charter* right is infringed and how, and if that infringement is demonstrably justifiable under s 1 of the *Charter*.

## 2. Rights at Stake

The CADP engages several rights guaranteed by the *Charter* through its procedures and its sanctions. These include s 2(d), the right to freedom of association, s 7, the right to life, liberty, and security of the person, s 8, the right against unreasonable search and seizure, s 11(d), the presumption of innocence and a fair and public trial, and s 15, the right to be free from discrimination. Section 2(d) is engaged because ineligible athletes (those serving an anti-doping sanction) are not allowed to train with eligible athletes and vice versa. It also means that eligible athletes may not associate with an athlete support

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<sup>3</sup> Rebecca Franks, “Blind Paralympian Banned from Competing after his Guide Tested Positive for a Banned Substance” (26 August 2019), online: *News.Com.Au*, <[www.news.com.au/sport/olympics/athletics/blind-paralympian-banned-from-competing-after-his-guide-tested-positive-for-banned-substance/news-story/b88eebde3ef826229f7ecab20c06a893](http://www.news.com.au/sport/olympics/athletics/blind-paralympian-banned-from-competing-after-his-guide-tested-positive-for-banned-substance/news-story/b88eebde3ef826229f7ecab20c06a893)>.

<sup>4</sup> See e.g., Ivan Waddington & Verner Møller, “WADA at Twenty: Old Problems and Old Thinking?” (2019) 11:2 *Intl J Sport Policy & Politics* 219; Dana Johannsen, “Drug Free Sport NZ’s Testing Regime Ineffective in Fight Against Doping” (26 September 2018), online: *Stuff*, <[www.stuff.co.nz/sport/other-sports/106848886/drug-free-sport-nzs-testing-regime-ineffective-in-fight-against-doping](http://www.stuff.co.nz/sport/other-sports/106848886/drug-free-sport-nzs-testing-regime-ineffective-in-fight-against-doping)>.

personnel in a professional capacity while that person is ineligible. Section 7 is engaged because it protects the right to make fundamental personal decisions, the right to move freely, and offers residual privacy protections. The Whereabouts Rule,<sup>5</sup> which monitors the physical location of athletes, engages s 7 because of its near-constant surveillance. Section 8 is engaged through the physical testing of athletes, as well as the invasion into their privacy through testing and provisions like the Whereabouts Rule and Athlete Biological Passport.<sup>6</sup> Section 11(d) is engaged because doping is a strict-liability offence, which means there is no presumption of innocence, even if the anti-doping rule violation occurred accidentally. Section 15 is engaged because there are some provisions of the CADP that may discriminate based on disability or analogous grounds.

While *Charter* case law is essential to analyze *Charter* infringements and what the threshold may be for rights to be violated, there are also other resources that have analyzed *Charter* rights with respect to drug testing regimes. For example, the Privacy Commission in 1990 and the Library of Parliament in 1999 and 2008, analyzed drug testing with respect to privacy and *Charter* rights.<sup>7</sup> Nancy Holmes and Karine Richer, authors of the 2008 Report, remarked that drug testing without consent violated s 7 of the *Charter* in a way that did not accord with principles of fundamental justice;<sup>8</sup> taking

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<sup>5</sup> The Whereabouts Rule is discussed further in Part 5.a of this chapter. It requires athletes to submit their whereabouts information on a quarterly basis, indicating their physical location between the hours of 5:00 a.m. and 11:00 p.m. daily, indicating one hour during that time where they will be at a specified location.

<sup>6</sup> The Athlete Biological Passport (ABP) is discussed further in Part 5.e of this chapter. It keeps a long-term record of athletes' biological markers that may indicate doping, even when athletes have not had a positive test for banned substances.

<sup>7</sup> Privacy Commissioner of Canada, *Drug Testing and Privacy* (Ottawa: Minister of Supply and Services, 1990) [1990 Report]; Nancy Holmes, *Drug Testing: Legal Implications* (Ottawa: Library of Parliament, 1999) [1999 Report]; Nancy Holmes & Karine Richer, *Drug Testing in the Workplace* (Ottawa: Library of Parliament, 2008) [2008 Report]. The 2008 Report seems to be an update of the 1999 report; it follows the same outline and uses the same headings. I rely more on the 2008 report than the 1999 report because it is the most recent; however (and despite its age), the 1990 report from the Privacy Commissioner is valuable for the unique issues it raises and its comments on athlete drug testing.

<sup>8</sup> Holmes & Richer, *supra* note 7 at 7-8.

bodily substances violated s 8 of the *Charter* because it amounted to a seizure and violated the privacy protection offered by s 8.<sup>9</sup> Holmes and Richer suggested that drug testing could also violate s 15 of the *Charter* on the basis it discriminates based on disability.<sup>10</sup> The Privacy Commission found drug testing itself is considered a violation of personal privacy because it not only requires “the surrender of a body fluid,” but it also requires observation while samples are given, which may be considered “intrusive and humiliating.”<sup>11</sup> Additionally, “the intrusiveness of testing does not end with the surrender of a body substance and the possibility of direct observation. Test subjects may be required to disclose their use of other drugs [...] that could cause a positive test result. This in turn may disclose information about the health of the person.”<sup>12</sup>

Testing, particularly out-of-competition testing, is one of the issues discussed in this chapter. Other elements of the CADP that may violate *Charter* rights include a prohibition on association, its strict liability regime that does not consider an athlete’s fault when determining whether or not an anti-doping rule violation has occurred, and disability rights that may be impaired by the testing process or by the therapeutic use exemption process. It may be that some *Charter* rights are infringed by the CADP, which then leads to the question of whether or not those infringements are demonstrably justified under s 1 of the *Charter*.

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<sup>9</sup> *Ibid* at 8-9.

<sup>10</sup> *Ibid* at 6; Holmes, *supra* note 7 at 16-17.

<sup>11</sup> Privacy Commission, 1990 Report, *supra* note 7 at 16.

<sup>12</sup> *Ibid* at 17.

### 3. Demonstrably Justifiable in a Free and Democratic Society

Section 1 of the *Charter* permits government actions to infringe *Charter* rights and freedoms so long as the infringements are demonstrably justifiable in a free and democratic society.<sup>13</sup> The test for whether or not something is demonstrably justified under s 1 of the *Charter* was developed by the Supreme Court of Canada in *R v Oakes*.<sup>14</sup> The test first requires that the limits on the *Charter* right be prescribed by law, and that the law have a pressing and substantial objective. Next, the test undertakes a proportionality analysis, which entails asking if there is a rational connection between the limitation and the objective of the law, if the law is minimally impairing, and if the means of achieving the objective are proportional to the importance of the objective (that is, do the salutary effects outweigh the deleterious effects).<sup>15</sup>

Generally, the first step of the *Oakes* test is easy to meet: identifying a limit to a *Charter* right that is prescribed by law usually entails pointing to a piece of legislation.<sup>16</sup> “Prescribed by law” can be met by regulations,<sup>17</sup> government policy,<sup>18</sup> or a collective

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<sup>13</sup> *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 1: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” [*Charter*].

<sup>14</sup> [1986] 1 SCR 103, 53 OR (2d) 71 [*Oakes*].

<sup>15</sup> *Ibid* at paras 69-71.

<sup>16</sup> E.g., in *Oakes*, the defendant was challenging the *Narcotics Control Act*, which is legislation and thus clearly prescribed by law. In *Eldridge*, [1997] 3 SCR 624 at para 84, 151 DLR (4th) 577, the Supreme Court said, “Assuming without deciding that the decision not to fund medical interpretation services for the deaf constitutes a limit ‘prescribed by law,’ that the objective of this decision—controlling health care expenditures—is ‘pressing and substantial’, and that the decision is rationally connected to the objective, I find that it does not constitute a minimum impairment of s 15(1).”

<sup>17</sup> E.g., in *R v Orbanski; R v Elias*, [2005] 2 S.C.R. 3, 2005 SCC 37, the Supreme Court held that roadside screening measures used by police to assess sobriety of drivers could be considered a limit prescribed by law. In *Black v Law Society of Alberta*, [1989] 1 SCR 591, 58 DLR (4th) 317, rules of a regulatory body met the threshold for “prescribed by law.”

<sup>18</sup> *Greater Vancouver Transit Authority v Canadian Federation of Students—British Columbia Component*, 2009 SCC 31 at paras 50, 55, [2009] 2 SCR 295 [*Greater Vancouver Transit Authority*].

agreement.<sup>19</sup> The Supreme Court takes a flexible approach to what is prescribed by law, as long as it is “a standard intelligible to the public and to those who apply the law” and not a limit arising from “arbitrary state action.”<sup>20</sup> Each of the sections below assumes that the CADP restrictions are limits prescribed by law assuming that, as argued in Chapter 3, the *Charter* applies to the CADP.<sup>21</sup> Through both Canada’s adoption of the UNESCO Convention Against Doping in Sport and the *Canadian Policy Against Doping in Sport—2011*, the CADP functions as a legal instrument that enables Canada to uphold its international obligations to combat doping in sports.<sup>22</sup>

The *Oakes* test may apply to a law in its entirety, but if only select provisions violate the *Charter*, then the *Oakes* test is applied solely to the impugned provisions. As such, this section proceeds by performing the *Oakes* test on each of the sections of the CADP that may infringe the *Charter*. That said, there are some overarching objectives behind the CADP (and anti-doping generally) that influence the objectives behind specific provisions in the CADP. Additionally, the overall objectives of the CADP and anti-doping, represent a pressing and substantial objective that bears on the pressing and substantial objective for each of the impugned provisions discussed below.<sup>23</sup>

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<sup>19</sup> *Ibid* at para 55.

<sup>20</sup> *Ibid*. At para 64, the Supreme Court also distinguishes between policies that are administrative in nature and legislative in nature, the latter being “law” if it establishes “a norm or standard of general application that has been enacted by a government entity pursuant to a rule-making authority.”

<sup>21</sup> This assumption is not unwarranted based on *Greater Vancouver Transit Authority, ibid*, at paras 74-80. In this case, the Supreme Court accepted that the Transit Authority’s advertising policy was prescribed by law.

<sup>22</sup> UNESCO. *International Convention Against Doping in Sport 2005*, 19 October 2005, 2419 UNTS 201 (entered into force 1 February 2007) [UNESCO Convention]; Government of Canada, *Canadian Policy Against Doping in Sport—2011* (11 February 2011), online: *Canada*, <[www.canada.ca/en/canadian-heritage/services/sport-policies-acts-regulations/policy-against-doping-sport.html](http://www.canada.ca/en/canadian-heritage/services/sport-policies-acts-regulations/policy-against-doping-sport.html)> [CPADS-2011].

<sup>23</sup> The stated objective of the CADP is “preserve all that is intrinsically valuable about sport.” Canadian Centre for Ethics in Sport, *2015 Canadian Anti-Doping Program* (1 September 2017), online: *CCES*, <[cces.ca/sites/default/files/content/docs/pdf/cces-policy-cadp-2015-v2-e.pdf](http://cces.ca/sites/default/files/content/docs/pdf/cces-policy-cadp-2015-v2-e.pdf)> [CADP] at 2.0. See also the discussion in Chapter 2 at 2.4 and 3.3.d.

The objectives underlying the CADP are protecting the integrity or “spirit” of sport and protecting the health of athletes.<sup>24</sup> Values behind these objectives include “the need for a level playing field,”<sup>25</sup> the implicit social value of sports,<sup>26</sup> the value of good health, and the value of athletes as role models.<sup>27</sup> Scholars like Daniel Goldsworthy have questioned the validity of these objectives with respect to athletes’ rights, saying:

Absent any further explication, it seems that the implicit justification [for anti-doping] is simply that the value of elite sport is ‘self-evident’ and in the public interest, as determined by a relevant governing body. Sport is good because it is good, or so the argument seems to go. But it is still not clear what the legitimate public interest in elite sport is, and furthermore whether such an interest is ‘legitimate’ or ‘fundamental’ *enough* to restrict the rights of athletes.<sup>28</sup>

Goldsworthy, an Australian law professor, calls on the World Anti-Doping Agency to articulate the rationale behind anti-doping beyond merely asserting “Sport is good because it is good” so that there are clear objectives stated behind the anti-doping provisions that seem to ignore athletes’ rights.<sup>29</sup> These overarching objectives that anti-doping regimes, like the CADP rely on, inform the objectives behind each provision of the CADP, even if they are not directly stated. Under s 1, courts give great deference to the articulation of objectives; they do not assess the means to achieve the objective, but rather focus on the objective itself; they “take the objectives at face value as valid.”<sup>30</sup> The objectives of the CADP are therefore taken at face value when performing a s 1 analysis.

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<sup>24</sup> For a more in-depth discussion of these objectives, revisit Chapter 1 at 2.3.

<sup>25</sup> Gabrielle Kaufman-Kohler, Giorgio Malinverni, & Antonio Rigozzi, *Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law* (Geneva, 2003) at paras 28-30, online: *WADA*, <[www.wada-ama.org/en/resources/legal/conformity-with-international-law](http://www.wada-ama.org/en/resources/legal/conformity-with-international-law)>.

<sup>26</sup> *Ibid* at paras 31-33.

<sup>27</sup> *Ibid* at para 34.

<sup>28</sup> Daniel Goldsworthy, “Athletes’ Rights under the World Anti-Doping Code: A Legitimate Public Interest?” (2018) 43:3 *Alternative LJ* 197 at 200.

<sup>29</sup> *Ibid* at 201.

<sup>30</sup> *R v Moriarty*, 2015 SCC 55 at para 30, [2015] 3 SCR 485.

Each of the *Charter* rights discussed below includes an *Oakes* analysis to determine whether or not the limits of the CADP are reasonable limits in a free and democratic society. This includes looking at the objective behind the impugned provision and how it relates to the overall objectives of the CADP.

#### 4. Section 2(d): Freedom of Association

Section 2(d) is a fundamental freedom that guarantees the right of individuals to come together and act collectively in pursuit of common goals.<sup>31</sup> The content of s 2(d) has been defined as “to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of their ends.”<sup>32</sup> Section 2(d) recognizes and attempts to redress inherent power imbalances such as those between employees and employers.<sup>33</sup>

Historically, s 2(d) has been strongly affiliated with the labour movement, gradually expanding within that context from s 2(d) only protecting the right to form associations to include the right to a process of collective bargaining<sup>34</sup> and the right to strike.<sup>35</sup> The Supreme Court has also found that s 2(d) protects the right not to associate (freedom from compelled association),<sup>36</sup> political association,<sup>37</sup> and commercial

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<sup>31</sup> *Mounted Police Association of Ontario v Canada (AG)*, 2015 SCC 1, [2015] 1 SCR 3 [*MPAO*]; *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 334, 38 DLR (4th) 161 [*Alberta Reference*].

<sup>32</sup> *Alberta Reference*, *ibid*, at 365, as cited (and adopted) in *MPAO*, *ibid*, at para 54.

<sup>33</sup> *Alberta Reference*, *ibid*, at 366, as cited in *MPAO*, *ibid*, at para 54: 2(d) encompasses: “collective activity that enables ‘those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict.’”

<sup>34</sup> *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*BC Health Services*].

<sup>35</sup> *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245 [*SFL*].

<sup>36</sup> *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211, 3 OR (3d) 511 [*Lavigne*].

<sup>37</sup> *Libman v Quebec (AG)*, [1997] 3 SCR 569, 151 DLR (4th) 385.



association.<sup>38</sup> In *Mounted Police Association of Ontario*, the Supreme Court acknowledged that s 2(d) also has strong roots in protecting religious minorities, and that the rights guaranteed by s 2(d) are valued because freedom of association “empowers groups whose members’ individual voices may be all too easily drowned out.”<sup>39</sup> A s 2(d) claim does not require proof that an association exists, just that the right to freely associate or join an association has been infringed, for example, by refusing to recognize a union as the bargaining agent for a group of employees.

The CADP potentially infringes freedom of association in two ways. First, there is a rule on prohibited association that bars athletes or other persons from associating with an ineligible athlete support personnel (i.e., coaches, trainers, team doctors) in a sports-related or professional capacity.<sup>40</sup> The sanction for an athlete who associates with an ineligible individual entails a period of ineligibility of up to two years<sup>41</sup> and disqualification of results (if the prohibited association occurred at an event).<sup>42</sup> Athletes have the burden of proof to establish that any association with the ineligible athlete support personnel was not in a professional or sport-related capacity.<sup>43</sup>

Second, imposing ineligibility periods also possibly infringes s 2(d) because ineligible athletes may not:

participate in any capacity in a *Competition* or activity (other than authorized anti-doping education or rehabilitation programs) authorized or organized by any *Signatory*, *Signatory’s* member organization, or a club or other member organization of a *Signatory’s* member organization, or in *Competitions* authorized or organized by any professional league or any

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<sup>38</sup> *Canadian Egg Marketing Agency v Richardson*, [1998] 3 SCR 157, 166 DLR (4th) 1 [*Egg Marketing*].

<sup>39</sup> *MPAO*, *supra* note 31 at para 55.

<sup>40</sup> CADP, *supra* note 23 at 2.10 and comment to rule 2.10. An ineligible person is someone who is serving a sanction for an anti-doping rule violation; an ineligible athlete support personnel would be someone like a coach or trainer who is serving a sanction for an anti-doping rule violation.

<sup>41</sup> *Ibid* at 10.3.5.

<sup>42</sup> *Ibid* at 10.1.

<sup>43</sup> *Ibid* at 2.10.3.

international or national level *Event* organization or any elite or national-level sporting activity funded by a governmental agency.<sup>44</sup>

Prohibited participation includes activities such as attending training camps or practices organized by a club or sport organization that adheres to the CADP; competing in professional leagues that are not signatories of the CADP such as the National Hockey League; and undertaking administrative activities such as officiating, volunteering, or directing at international- or national-level events, even if those events are organized by non-CADP or non-WADC signatories.<sup>45</sup> If an ineligible person violates the prohibited association rule, an additional period of ineligibility is imposed.<sup>46</sup>

The names of ineligible individuals are publicly released so that eligible individuals are able to identify if they are permitted to associate with someone or not. The CADP states that “Athletes, athlete support personnel or other persons who are subject to the CADP are responsible for meeting the requirements of the CADP.”<sup>47</sup> Further, national-level athletes, university athletes, and participants at major events are required to complete anti-doping education training on an annual basis, which means even if they may not know someone with whom they are associating is ineligible, they are presumed to know that prohibited association is an anti-doping rule violation for which they can be sanctioned, and that there is a registry of ineligible individuals publicly available.

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<sup>44</sup> *Ibid* at 10.12.1 (italics and non-standard capitalization in the original). The CADP defines “competition” as “a single race, match, game, or singular sport contest”; event is defined as “a series of individual competitions conducted together under on ruling body”; and “signatory” is defined as “Those entities signing the [World Anti-Doping] Code and agreeing to comply with the [World Anti-Doping] Code” (CADP, *ibid*, at Appendix 1: Definitions (pp 69-75)).

<sup>45</sup> *Ibid* at Comment to 10.12.1.

<sup>46</sup> *Ibid* at 10.12.3.

<sup>47</sup> *Ibid* at 6.1.1.

Ineligibility and prohibited association may violate freedom of association for athletes because it punishes them for associating with an ineligible person, which means they do not have the right to associate freely. It may violate freedom of association for ineligible individuals because their ability to freely associate in any sporting capacity is erased: they may not participate, train, compete, coach, officiate, volunteer, or be involved in any capacity with a sport organization. There is a distinction, however, between “associating” and “association.” Although s 2(d) protects the right to “freely associate,” the case law primarily deals with the right of individuals to *join* an organized association (like trade unions or political parties).<sup>48</sup>

The Supreme Court has been reluctant to expand s 2 freedoms in new or novel ways.<sup>49</sup> This is evident in the fact that s 2(d) has predominantly been exercised in labour law, and the fact that it took decades within labour law for s 2(d) to expand to include the right to a process of collective bargaining and the right to strike.<sup>50</sup> The unwillingness to rapidly expand s 2(d) protections likely indicates that courts would be unwilling to extend

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<sup>48</sup> The case law also deals with, as mentioned above, the right not to be compelled to join an association. See *Lavigne*, *supra* note 36. Section 2(d) has also been held not to apply to intimate relationships; see *R v Skinner*, [1990] 1 SCR 1235, [109 NR 241]. In this case, the Supreme Court held that *Criminal Code* provisions prohibiting communicating for the purpose of engaging in prostitution did not offend freedom of association. *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*] also dealt with the prohibition on communicating for the purpose of engaging in prostitution, but under s 2(b) freedom of expression, not s 2(d). Family relationships are not protected by s 2(d); see *Catholic Children's Aid Society of Metropolitan Toronto v S(T)* (1989), 69 OR (2d) 189, 60 DLR (4th) 397 (ON CA). Family associations are not protected because the relationship is not created for the purpose of pursuing goals in common. Associations involving violence are also not protected by s 2(d); see *MPAO*, *supra* note 31 at para 59.

<sup>49</sup> See e.g., *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 SCR 386. In this case, the Supreme Court held the Ktunaxa's freedom of religion claim did not fall within the scope of s 2(a) because, according to the majority, the Ktunaxa sought to protect the presence of the grizzly bear spirit itself, which would extend 2(a) to the object of the belief.

<sup>50</sup> *BC Health Services*, *supra* note 34, *SFL*, *supra* note 35, *MPAO*, *supra* note 31. These decisions overturned the 1987 labour trilogy (*Alberta Reference*, *supra* note 31; *PSAC v Canada*, [1987] 1 SCR 424; *RWDSU v Saskatchewan*, [1987] 1 SCR 460), which denied constitutional protection of the right to a process of collective bargaining and the right to strike. In *MPAO*, the Supreme Court adopted the dissent from *Alberta Reference*, which took a broader view of the protection offered by s 2(d).

the protection of s 2(d) to ineligible athletes or athlete support personnel sanctioned under the CADP. Even without the burden of a making a novel s 2(d) claim, courts may conclude there is no violation of s 2(d) under the CADP because joining an association is not expressly prohibited by the CADP, even for sanctioned individuals. An additional consideration is that s 2(d) does not always protect the activities of an association.<sup>51</sup> This lack of guaranteed protection for an association's activities means that even though ineligible individuals may still join an association, they may not have a right to participate in the activities of that association, like competing in or volunteering at events. This lack of guaranteed protection for an association's activities makes it even less likely the CADP infringes s 2(d).

#### Section 1 Analysis for a Section 2(d) Infringement

Although it is improbable that s 2(d) is infringed by the CADP, performing a s 1 analysis is useful to contemplate what the purpose behind prohibiting association may be.<sup>52</sup> The pressing and substantial objective behind restricting association through ineligibility and through the rule against prohibited association is not articulated in the CADP; however, prohibiting association with ineligible individuals suggests an objective relating to discouraging or deterring individuals from gaining knowledge about doping or access to performance enhancing drugs (PEDs) from sanctioned individuals. The objective,

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<sup>51</sup> *Egg Marketing*, *supra* note 38. But, *MPAO*, *supra* allowed that 2(d) protected activities of an organization when they are in pursuit of constitutional rights, or activities enable vulnerable individuals to meet on more equal terms (like collective bargaining & striking); see paras 52-54, 66.

<sup>52</sup> In his legal opinion on the draft 2015 WADC, Jean-Paul Costa addressed whether or not prohibited association was compatible with the recognized principles of international law and human rights. Costa ultimately concluded that it was because the rule was "sufficiently predictable" and the burden of proof on the athlete was not too heavy. His analysis did not contemplate what the potential objective was for prohibited association. See Jean Paul Costa, "Legal Opinion Regarding the Draft 3.0 Revisions of the World Anti-Doping Code" (25 June 2013) at 12-15, online: *WADA*, <[www.wada-ama.org/en/resources/legal/legal-opinion-on-the-draft-2015-world-anti-doping-code](http://www.wada-ama.org/en/resources/legal/legal-opinion-on-the-draft-2015-world-anti-doping-code)>.

therefore, is to prevent doping, and the means of prevention is to prohibit association with people who have committed anti-doping rule violations. This serves to help protect the integrity of sport because, in theory, it makes it harder to gain access to and knowledge about PEDs or prohibited methods. Prohibited association also supports the objective of protecting athletes' health in the same way: making PEDs harder to access (e.g., because they cannot gain access to drugs, nor can they gain knowledge from individuals who know how to dope) means their health is not potentially at risk from using those drugs.

There is a rational connection evident between the infringement and the pressing and substantial objective: prohibiting association helps protect against doping because it makes it harder for athletes to gain knowledge about how to dope and access to drugs.

The impediment to fully exercising the right to associate freely is minimally impairing. Ineligible individuals are not prohibited from joining an association, which means that while s 2(d), arguably, is infringed, its infringement is a reasonable limit. Unless an ineligible athlete can argue that competing, coaching, volunteering, or otherwise participating in sports is in pursuit of a constitutional right, the association's activities are not presumed to be protected under s 2(d).<sup>53</sup> Ineligibility and prohibited association minimally impair an individual's s 2(d) right to freedom of association.<sup>54</sup>

The final question under the s 1 analysis asks whether the salutary effects outweigh the deleterious effects. The harms of the sanction on the ineligible individual are weighed against the merits of preventing doping. For example, athletes who cheat

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<sup>53</sup> *MPAO, supra* note 31.

<sup>54</sup> In the event that an eligible athlete was arguing that prohibited association violated their s 2(d) rights because they could not associate with, for example, former teammates, the potential infringement of s 2(d) would still be minimally impairing in that context because prohibited association is only an anti-doping rule violation if the association occurs in a sports-related context. An eligible athlete could still associate with an ineligible athlete in a non-sporting context.

should not have access to federal support, and prohibiting them from competing during ineligibility means that non-doping athletes have a greater chance to succeed and earn their spot on a national team or receive federal funding. It is tempting to argue that prohibited association may have a disproportionately harsh effect at the regional level. For example, if sanctioned individuals compete in sports with relatively few participants, the isolation imposed by ineligibility and the rule on prohibited association could result not only in complete ostracization of the ineligible individual, but also harm the overall participation level in that sport. Recreational athletes may not want to participate if they fear they will be drug-tested, and organizers may not continue hosting events if fewer people attend. However, the potential chilling effect of prohibited association likely has less to do with prohibited association and more to do with the possibility of being tested. Given that the main focus of the CADP is on national- and international-level athletes, the chance of a provincial-level athlete being tested and sanctioned may be small enough that the speculative harms of the sanction at lower levels of competitive sport support the argument that the sanction is indeed proportional.<sup>55</sup>

Section 2(d) is likely not infringed by the CADP, but even if it is found to impair freedom of association, the impairment is minimally impairing and is proportional when considering the objectives of the CADP and the rationales behind the limitations on free association. Thus, while s 2(d) rights may be limited, they are reasonable limitations that can be demonstrably justified.

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<sup>55</sup> E.g., Between April 1, 2017, and March 31, 2018, the CCES performed 2,420 out-of-competition tests compared to 1,127 in-competition tests under the CADP; it performed 906 in-competition tests and 864 out-of-competition tests on a fee-for-service basis. Only athletes in the registered test pool are subject to out-of-competition testing. See Canadian Centre for Ethics in Sport, *Annual Report 2017-2018* (Ottawa: CCES, 2018) at 17.

## 5. Section 7: Life, Liberty, and Security of the Person

Section 7 of the *Charter* guarantees that life, liberty, and security of the person may not be limited except in accordance with the principles of fundamental justice. Liberty extends beyond physical liberty and includes the right to personal autonomy,<sup>56</sup> the right to make fundamental personal choices,<sup>57</sup> the right to move freely,<sup>58</sup> and also offers some protection of privacy.<sup>59</sup> Security of the person refers to both physical and psychological security of the person,<sup>60</sup> and may offer some residual protection of privacy.<sup>61</sup> Privacy rights are generally considered under s 8, particularly with respect to information obtained from a search or seizure, but the residual protection of privacy rights offered by s 7 may apply to information obtained through means other than a search or seizure, such as legislation.<sup>62</sup>

Determining whether or not s 7 has been violated is a multi-step analysis. The first is ensuring that the person claiming the violation fits within the category of

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<sup>56</sup> See e.g., *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 66, 152 DLR (4th) 577: “[...] the right to liberty enshrined in s 7 of the *Charter* protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference.”

<sup>57</sup> See e.g., *R v Morgentaler*, [1988] 1 SCR 30, 63 OR (2d) 281 [*Morgentaler*]; *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 SCR 181, *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 [*Carter*].

<sup>58</sup> See e.g., *R v Heywood*, [1994] 3 SCR 761, 120 DLR (4th) 348 [*Heywood*].

<sup>59</sup> Privacy protected under s 7 is considered a liberty interest, and protecting privacy under s 7 protects information that is not gained under a search or seizure. See e.g., *R v O'Connor*, [1995] 4 SCR 411 at para 129, 130 DLR (4th) 235; see also *Cheskes v. Ontario (Attorney General)* (2007), 87 OR (3d) 581 at paras 78-85, 288 DLR (4th) 449 (Ont Sup Ct) [*Cheskes*].

<sup>60</sup> See e.g., *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46, 216 NBR (2d) 25 (Security of the person includes psychological integrity); *Morgentaler*, *supra* note 57; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 [*PHS*]; *Bedford*, *supra* note 48, *Carter*, *supra* note 57 (Security of the person includes potential physical harm).

<sup>61</sup> See e.g., *Ruby v Canada*, 2002 SCC 75 at paras 32-33, [2002] 4 SCR 3 [*Ruby*]. The Supreme Court in *Ruby* does not take a position on whether or not privacy rights are protected under security of the person: “In my view, it is unnecessary to the disposition of this case to decide whether a right to privacy comprising a corollary right of access to personal information triggers the application of s 7 of the *Charter*.”

<sup>62</sup> E.g., in *Ruby*, *ibid*, the issue was whether individuals had a right to control the dissemination of information collected by the government under legislation such as the *Privacy Act*, RSC 1985, c P-21. In *Cheskes*, *supra* note 59, the legislation at issue was the *Vital Statistics Act*, RSO 1990, c V4.

“everyone”<sup>63</sup>; second is showing that life, liberty, or security of the person has been interfered with; third is showing that the interference with or denial of life, liberty or security of the person has not been done in accordance with the principles of fundamental justice.<sup>64</sup> Principles of fundamental justice relevant here include the right to a fair hearing and restricting the harshest penalties (e.g., imprisonment) for offences where there is moral blameworthiness.<sup>65</sup>

The list of principles of fundamental justice is not a closed list. Principles of fundamental justice are 1) legal principles, 2) supported by social consensus, 3) yielding a manageable standard.<sup>66</sup> A law may be found contrary to principles of fundamental justice if it is vague, arbitrary, overbroad, or grossly disproportionate.<sup>67</sup> The combination of an absolute liability offence with a minimum sanction of imprisonment is an example of something that violates a principle of fundamental justice.<sup>68</sup> Vagueness requires that laws have an intelligible standard, but the standard does not require absolute precision.<sup>69</sup> The minimum standard for vagueness is fair notice and limits on law enforcement

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<sup>63</sup> “Everyone” does not include corporations, but it does include non-Canadians. See Robert Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 6th ed (Toronto: Irwin Law, 2017) at 248, citing *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577 [*Irwin Toy*]; *R v Singh*, 2007 SCC 48, [2007] 3 SCR 405.

<sup>64</sup> Sharpe & Roach, *ibid*, at 246.

<sup>65</sup> See e.g., Sharpe & Roach, *ibid*, at 256-60. In *R v DB*, 2008 SCC 25, [2008] 2 SCR 3, the Supreme Court held that presuming young people “had diminished moral blameworthiness and culpability” was a principle of fundamental justice. In *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350, the right to a fair hearing (that is to know the case against you and to have the opportunity to respond) was held as a principle of fundamental justice. In *Re: BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536 [*Re: BC MVA*], the Supreme Court held that imprisonment should be reserved for cases of moral blameworthiness.

<sup>66</sup> Sharpe & Roach, *supra* note 63 at 252.

<sup>67</sup> *Ibid* at 247.

<sup>68</sup> *Re: BC MVA*, *supra* note 65. Both strict and absolute liability offences shift the burden from the prosecution to the defendant. Strict liability offences allow for a defence of due diligence; absolute liability offences allow for no defences. Strict and absolute liability are discussed more under s 11(d).

<sup>69</sup> *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 16, [2004] 1 SCR 76 [*Canadian Foundation for Children*]; *Irwin Toy*, *supra* note 63.



discretion.<sup>70</sup> For example, a law that fails to meet the standard for vagueness is a law where either an individual would not be able to determine when they are at risk of criminal sanction or a law that confers too much discretion upon the people enforcing it.<sup>71</sup> A law that is arbitrary bears no relation to or is inconsistent with its objectives.<sup>72</sup> A law needs to be rationally capable of fulfilling its objectives.<sup>73</sup> If a law is drafted more broadly than necessary to attain its objective, it is overbroad.<sup>74</sup> The test for whether or not a law is overbroad asks if the state “uses means which are broader than necessary to accomplish that objective.”<sup>75</sup>

The CADP potentially interferes with liberty and security of the person interests through the Whereabouts Rule, the Prohibited List, public disclosure of anti-doping rule violations, mandatory testing, mandatory provisional suspensions, and minimum sanctions. Elements of the CADP that may not accord with principles of fundamental justice include the waiver of alternative relief, the standard of proof, and the uniform application of the CADP sanctions to all athletes, regardless of their age or ability.

#### a. Whereabouts (Out-of-Competition Testing)

The Whereabouts Rule requires that athletes in the registered testing pool submit their whereabouts information for the upcoming three months up to three months in advance.<sup>76</sup> This means that athletes need to notify the CCES of where they will be living, training, and competing, as well as identifying “one specific 60-minute time slot where he/she will

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<sup>70</sup> Sharpe & Roach, *supra* note 66 at 263.

<sup>71</sup> *Canadian Foundation for Children*, *supra* note 69 at para 16, as cited in Sharpe & Roach, *ibid*, at 263.

<sup>72</sup> *PHS*, *supra* note 60; *Bedford*, *supra* note 48 at paras 111 & 113.

<sup>73</sup> Sharpe & Roach, *supra* note 63 at 265.

<sup>74</sup> *Ibid* at 264.

<sup>75</sup> *Heywood*, *supra* note 58 at 792-93, as cited in Sharpe & Roach, *ibid*, at 264.

<sup>76</sup> The CADP recommends that whereabouts information is submitted on a quarterly basis, that is, every three months, but athletes are able to change and updates their whereabouts information up to a day in advance. See CADP, *supra* note 23 at 5.6.1 (and 5.6 generally).

be available at a specific location for testing”<sup>77</sup> between the hours of 5:00 a.m. and 11:00 p.m. so that doping control staff may show up to complete unannounced out-of-competition tests. Athletes are able to update their whereabouts information up to one hour in advance of any changes. Doping control staff are not required to show up exclusively within the specified 60-minute time slot, but only tests missed within that time slot count as a whereabouts failure.<sup>78</sup> Athletes get no advance notification of these tests. Missing three tests within 12 months results in an anti-doping rule violation.<sup>79</sup>

The Whereabouts Rule engages both liberty and security of the person interests because of its possible infringements on movement and privacy.<sup>80</sup> Athletes share their personal details and location for every single day of the year, every year they are part of the registered test pool. This information is submitted through WADA’s online platform, ADAMS.<sup>81</sup> It is shared with WADA and other national anti-doping agencies under the justification of harmonizing global anti-doping efforts through the cooperation of anti-doping stakeholders.<sup>82</sup> Although WADA and the CCES have guidelines in place to ensure the protection of personal and private information, those guidelines are not

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<sup>77</sup> World Anti-Doping Agency, *World Anti-Doping Code International Standards: Testing and Investigations* (Montreal: WADA, January 2017) at Annex I, I.1.1.b (p 84) [WADA ISTI].

<sup>78</sup> *Ibid* at 24, “missed test” definition. See generally WADA ISTI Annex I.

<sup>79</sup> An ADRV can also be committed on the basis of a combination of three missed tests and incorrect whereabouts information; CADP, *supra* note 23 at 2.4. The 12-month countdown begins either on the date of the first missed test, or, if the first infraction is a filing failure (filing incorrect information), from the start of the quarter (e.g., April 1 rather than April 23). See WADA ISTI, *supra* note 77 at Annex I. The timing of whereabouts failures was recently an issue for American sprinter Christian Coleman, who had anti-doping charges against him dropped. See Alan Abrahamson, “Coleman Case Out because USADA Doesn’t do Basic it Demands of Athletes: Know the Rules” (2 September 2019), online: *Wire Sports* <[www.3wiresports.com/articles/2019/9/2/q671frgu0owwde6y4mykn44y72s0aw](http://www.3wiresports.com/articles/2019/9/2/q671frgu0owwde6y4mykn44y72s0aw)>.

<sup>80</sup> Privacy is engaged with respect to whereabouts information under s 7 on the basis that it is private information obtained through means other than a search and seizure.

<sup>81</sup> ADAMS is “The Anti-Doping Administration and Management System is a Web-based database management tool for data entry, storage, sharing, and reporting designed to assist stakeholders and WADA in their anti-doping operations in conjunction with data protection legislation.” CADP, *supra* note 23 at Appendix 1 (p 69).

<sup>82</sup> *Ibid* at 5.6.2.

infallible and WADA and NADOs, including the CCES, have been hacked without initially knowing the extent of the information that may have been accessed.<sup>83</sup>

The Whereabouts Rule has been challenged at the European Court of Human Rights (ECtHR) on the basis that it violates Article 8 of the *European Convention on Human Rights*, which protects the right to respect for private and family life.<sup>84</sup> The ECtHR upheld the Whereabouts Rule under Article 8.1 of the ECHR, which allows limits on the right to privacy if those limits are “in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”<sup>85</sup> The ECtHR considered the Whereabouts Rule to have the status of law, and that its limitations on privacy were justifiable on the basis of the protection of rights and freedoms of others, because doping in sport was unfair to other competitors and “a dangerous incitement for young people to use prohibited substances and deprived spectators of fair competition.”<sup>86</sup> Although the analytical framework used to determine whether or not Article 8 of the ECHR has been violated and if that violation is justifiable is different from the framework for a *Charter* analysis, the reasons articulated by the ECtHR in upholding the

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<sup>83</sup> See Canadian Centre for Ethics in Sports, “CCES Email and Internet Restored” (last visited 07 September 2019), online: *CCES*, <[cces.ca/cces-email-and-internet-restored](http://cces.ca/cces-email-and-internet-restored)>.

<sup>84</sup> *Fédération Nationale des Syndicats Sportifs (FNASS) and Others v France* (application no 48151/11 & 77769/13) [2018], ECLI:CE:ECHR:2018:0118JUD004815111 [FNASS], online: *ECtHR*, <[hudoc.echr.coe.int/eng?i=001-180442](http://hudoc.echr.coe.int/eng?i=001-180442)>; Council of Europe & European Court of Human Rights, *European Convention on Human Rights* (In force since 1 June 2010), Art 8 [ECHR].

<sup>85</sup> ECHR, *supra* note 84 at Art 8.2.

<sup>86</sup> *FNASS*, *supra* note 84 at para 166. See also Natalie St Cyr Clarke, “The Legality of the Anti-Doping Whereabouts Rules: An Analysis of the FNASS v France Human Rights Case” (14 March 2018), online: *Law in Sport*, <[www.lawinsport.com/topics/sports/item/the-legality-of-the-anti-doping-whereabouts-rules-an-analysis-of-the-fnass-v-france-human-rights-case](http://www.lawinsport.com/topics/sports/item/the-legality-of-the-anti-doping-whereabouts-rules-an-analysis-of-the-fnass-v-france-human-rights-case)>; World Anti-Doping Agency, news release, “WADA Welcomes ECHR Decision to Back Whereabouts Rule” (18 January 2018), online: *WADA* <[www.wada-ama.org/en/media/news/2018-01/wada-welcomes-echr-decision-to-back-whereabouts-rules](http://www.wada-ama.org/en/media/news/2018-01/wada-welcomes-echr-decision-to-back-whereabouts-rules)>.

Whereabouts Rule would likely resonate in Canadian courts.<sup>87</sup> These include acknowledging that the fight against doping requires the cooperation of both athletes and regulators, that anti-doping is a pressing social need, and that while athletes must submit to the Whereabouts Rule and out-of-competition testing, they control where the testing happens through their whereabouts information.<sup>88</sup>

The Whereabouts Rule, while intrusive and, according to some athletes, “a bureaucratic nightmare,”<sup>89</sup> arguably does not meet the threshold for a s 7 violation of liberty or security of person. Decisions like *Adams 2011* and *Dodds* point out that athletes choose to compete and that competing for Canada is a privilege.<sup>90</sup> Although the Whereabouts Rule is no doubt onerous and a great incursion into an athlete’s privacy, it likely does not intrude on privacy or liberty to an extent that does not accord with principles of fundamental justice. Even if “liberty to compete” was a liberty interest recognized and protected by s 7, an athlete’s liberty to compete is not violated by

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<sup>87</sup> Again, although the analytical framework is different, the ECtHR determined that the Whereabouts Rule met the threshold of being “law” on the basis that it was sufficiently precise and not arbitrary. See *St Cyr Clarke*, *supra* note 86 at footnote 23.

<sup>88</sup> *Ibid* at footnote 36.

<sup>89</sup> Lori Ewing, “Anti-Doping Rules a Bureaucratic Nightmare for Canadian Athletes,” *The Canadian Press* (4 December 2012), online: *The Toronto Star*, <[www.thestar.com/sports/olympics/2012/12/04/antidoping\\_rules\\_a\\_bureaucratic\\_nightmare\\_for\\_canadian\\_athletes.html](http://www.thestar.com/sports/olympics/2012/12/04/antidoping_rules_a_bureaucratic_nightmare_for_canadian_athletes.html)>. The Whereabouts Rule has changed slightly from this 2012 article; the 2015 CADP allows for three whereabouts failures in 12 months, not the 18 months stated here. Although not related to a denial of liberty or security of the person, the Whereabouts Rule has also been criticized on the basis it takes certain privileges, like an internet connection and a fixed address, for granted, two things that athletes who travel a lot for training and competition may not always be able to guarantee having. See Anna Efverström, Åsa Bäckström, Nader Ahmadi & David Hoffe, “Contexts and Conditions for a Level Playing Field: Elite Athletes’ Perspectives on Anti-Doping in Practice.” (2016) 5 *Performance Enhancement & Hlth* 77.

<sup>90</sup> *Adams v Canada*, 2011 ONSC 325, 272 OAC 301 [*Adams 2011*]; *In the Matter of Glen Dodds and the Sport Medicine Council of Canada*, (21 May 1987), unreported decision of an independent arbitrator, (Arbitrator: RJ Delisle) [*Dodds*]. A counterpoint to this perspective is *Bedford*, *supra* note 48 at paras 86-89, where the Supreme Court found that the choice to engage in sex work was not the cause of the sexworkers’ exposure to danger.

providing whereabouts information, particularly because, as identified by the ECtHR, the whereabouts information enables the athlete to control where they are tested.<sup>91</sup>

Even if the Whereabouts Rule did rise to a breach of liberty or security of the person, it would not occur in a manner that is contrary to principles of fundamental justice. The Whereabouts Rule is not overly broad or arbitrary because it is restricted to athletes in the registered test pool. Similarly, it yields an intelligible standard such that athletes know their responsibilities for inputting their whereabouts information and the consequences of incorrect information or a missed test. Finally, while it may be a “bureaucratic nightmare,” it is not grossly disproportionate when considering the ends it is trying to achieve: catch dopers when they are not expecting to be tested.

#### b. The Prohibited List

The Prohibited List infringes liberty interests in that athletes do not have the liberty to put whatever they like into their bodies. The banned substances on the list include known performance enhancing drugs, like steroids, recreational drugs, like cocaine, and the list also includes various over-the-counter and prescription drugs. Some drugs are banned because of their effects on athletic performance; some are banned because they are illegal; others are banned because of their ability to mask other substances that enhance performance.

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<sup>91</sup> This point is also emphasized by people like Renee Anne Shirley, the former executive director of the Jamaican Anti-Doping Commission, who suggests that some athletes use whereabouts information to deter out-of-competition testing due to the costs. See Renee Anne Shirley, “It’s not about missing whereabouts...Athletes can train anywhere in world they want incl remote locations. It is their life so they gladly fill in ADAMS. NADOs don’t attempt test them as will cost \$\$ to send DCO team abroad & travel long distances to test them where they are training” (31 August 2019 at 5:46), online: *Twitter*, <[twitter.com/RAneShirley/status/1167780606689910785](https://twitter.com/RAneShirley/status/1167780606689910785)>.

The Supreme Court has ruled that the choice to take recreational drugs is not considered a fundamental personal decision and thus infringing that choice does not rise to the level of infringing s 7 liberty rights.<sup>92</sup> Taking recreational drugs has been distinguished from decisions like refusing medical treatment because it is not a choice that goes “to the very core of what it means to enjoy individual dignity and independence.”<sup>93</sup> On the other hand, the Quebec Court of Appeal has ruled that liberty rights include the right to take intoxicants without being subject to the obligation to provide a drug test.<sup>94</sup> Athletes must comply with the Prohibited List, and they are subject to mandatory drug testing, in and out of competition. This combination may rise to a s 7 violation if it infringes the right to liberty in a manner that does *not* accord with the principles of fundamental justice. As mentioned above, however, competing in sports is a choice; taking substances on the Prohibited List is also a choice. Neither of these choices plausibly meet the threshold of a fundamental personal decision protected by s 7 liberty rights.

Even though it is dubious that the Prohibited List violates s 7, it is interesting to consider whether or not the Prohibited List is possibly contrary to principles of fundamental justice because of the many hundreds of substances it prohibits. If there is no clear nexus between the objectives of the CADP and the Prohibited List, s 7 may be violated in a way that does not accord with principles of fundamental justice on the basis of arbitrariness. Additionally, if a law is drafted too broadly to achieve its objectives, it

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<sup>92</sup> *R v Malmo-Levine; R v Caine*, 2003 SCC 74, [2003] 3 SCR 571 [*Malmo-Levine*].

<sup>93</sup> See e.g., David Mullan & Deirdre Harrington, “The *Charter* and Administrative Decision-Making: The Dampening Effects of *Blencoe*” (2002) 27 *Queen’s LJ* 879 at 896: “choices going to the very core of what it means to enjoy individual dignity and independence.”

<sup>94</sup> *R v Dion*, unreported CAQ, rendered 31 May 1990, as cited in Holmes & Richer, *supra* note 7 at 7. The QCCA in *Dion* interpreted liberty as including the right to consume intoxicants without being subject to an obligation to provide a drug test.

may also violate principles of fundamental justice. The Prohibited List includes hundreds of different substances and may be overbroad if it is considered more broad than necessary to achieve the objectives of the CADP. For example, drugs to treat acne, high blood pressure or kidney failure, such as spironolactone are banned because they mask performance-enhancing drugs; taking that drug lowers the level of androgens in the body and has side effects like, vomiting, dizziness, breast pain and erectile dysfunction, which may outweigh the benefits gained by the performance-enhancing drug someone may wish to mask.<sup>95</sup>

### c. The Prohibited List and Principles of Fundamental Justice.

An arbitrary law has no connection to its objectives or is inconsistent with its objectives. There is a clear connection and consistency between requiring athletes to adhere to the Prohibited List and the objectives of the CADP: preventing doping in sport and protecting the health of athletes. Although the Prohibited List is extensive, it is not arbitrary, even when combined with mandatory testing, because of the nexus between banned substances (including those known to enhance performance and those known to mask performance-enhancing drugs) and testing to ensure athletes have not taken banned substances.

The Prohibited List risks overbreadth because it contains hundreds of substances and methods, divided into several different classifications.<sup>96</sup> This list is updated annually;

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<sup>95</sup> R Grandhi et al, “Spironolactone for the Treatment of Acne: A 4-Year Retrospective Study” (2017) 233:2-3 *Dermatology* 141.

<sup>96</sup> World Anti-Doping Agency, *The World Anti-Doping Code International Standard: Prohibited List* (Montreal: WADA, January 2019), online: *WADA*, <[www.wada-ama.org/sites/default/files/wada\\_2019\\_english\\_prohibited\\_list.pdf](http://www.wada-ama.org/sites/default/files/wada_2019_english_prohibited_list.pdf)> [Prohibited List]. Classifications include: anabolic agents, peptide hormones, beta 2 agonists, diuretics and masking agents, hormone and metabolic modulators, stimulants, cannabinoids, and glucocorticoids.

each edition of the list is in effect from January 1 to December 31. Some substances on the list are prohibited without even being specifically named, for example anabolic agents “with a similar chemical structure or similar biological effect(s)” to the anabolic steroids listed.<sup>97</sup> What saves the Prohibited List from being overbroad is the possibility of individuals being granted a therapeutic use exemption (TUE) to use a prohibited substance on the list if it is medically necessary.<sup>98</sup> This means that athletes who may rely on a banned substance are not penalized and the Prohibited List is not broader than necessary to achieve the objectives of anti-doping.

#### d. Public Disclosure

Under the CADP, anti-doping rule violations are publicly disclosed after the athlete and other stakeholders have been notified of the anti-doping rule violation (ADRV). This disclosure may happen before the athlete’s B sample is tested, and before the doping tribunal hears the case.<sup>99</sup> Public disclosure after the case is concluded is mandatory under the CADP.<sup>100</sup> When an ADRV is publicized, the name of the individual is also publicized. This risks security of the person in that the publication of the ADRV can have immediate effect on the individual’s livelihood, and affect psychological well-being because of the stigmatizing effect resulting from publicity.

The threshold of psychological harm needed to trigger *Charter* protection is high. Simply having an offence alleged (regardless of whether it is criminal, civil, human

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<sup>97</sup> *Ibid* at 2.

<sup>98</sup> TUEs are discussed further under s 15.

<sup>99</sup> When an athlete gives a urine sample, it is divided into two containers. The B sample is tested to confirm the results of the A sample. If the samples do not match, there is no anti-doping rule violation. See Chapter 2.4.d.i.

<sup>100</sup> CADP, *supra* note 23 at 14.3.



rights, or an anti-doping rule violation) is not enough to engage *Charter* protection.<sup>101</sup> In order for state-imposed psychological harm to violate security of the person under s 7, the psychological harm must be “severe psychological trauma.”<sup>102</sup> The Supreme Court confirmed in *Blencoe* that “dignity, protection from stigma, and the preservation of one’s reputation were not freestanding constitutional rights, but underlying values which informed decisions on whether there was sufficient interference with psychological integrity.”<sup>103</sup>

Likewise, the negative ripple effects from being charged with an offence, such as non-association (because ineligible individuals may not associate with eligible athletes), or loss of income, do not meet the minimum threshold to engage security of the person. While an individual may lose income from an ADRV, income (or even the right to work or practice a profession<sup>104</sup>) is not constitutionally protected and individuals are not stigmatized to the extent that any future employment is impossible.<sup>105</sup> The success of several athletes who have returned to competition after serving their sanctions for ADRVs proves that an ADRV is not a career-ending event.<sup>106</sup> Non-association, also, does

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<sup>101</sup> E.g., *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, 190 DLR (4th) 513 [*Blencoe*].

<sup>102</sup> *Ibid*; Mullan & Harrington, *supra* note 93 at 880.

<sup>103</sup> *Ibid* at 898.

<sup>104</sup> *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 SCR 1123, 109 NR 81 [*Prostitution Reference*].

<sup>105</sup> E.g., Guy Greavette, one of Canada’s disgraced weightlifters at the 1983 PanAm Games, went on to have a successful coaching career, despite being stigmatized. See Tom Harrington, “Weightlifter Still Stigmatized 20 Years after Pan Am Scandal,” *CBC* (6 February 2002), online: *CBC*, <[www.cbc.ca/player/play/1743498426](http://www.cbc.ca/player/play/1743498426)>. Compare this to Adams, who sought “pecuniary and non-pecuniary damages of \$5 million for loss of income and for damages for breach of fiduciary duty, breach of contract, negligence, negligent misrepresentation, malicious and/or wrongful prosecution, abuse of process, mental distress and damage to reputation; reimbursement for all expenses incurred in defending the ‘prosecution’ under the CADP; \$500,000 in aggravated damages; and \$750,000 in punitive damages.” See *Adams 2011*, *supra* note 90 at para 17. This claim was dismissed, and Adams eventually settled another civil suit against the CCES.

<sup>106</sup> The most prominent athlete to return from an anti-doping ban is likely American sprinter Justin Gatlin, who served two suspensions for ADRVs. In 2001, he served a one-year ban (reduced from two) after testing positive for a banned substance; from 2006-2010 he served a four-year sentence (reduced from

not engage security of the person because, even though ineligible individuals are cut off from teammates and coaches in that they can no longer associate with them in a sports-related capacity, ineligibility does not last forever—even for those with lifetime bans.<sup>107</sup> Public disclosure, although harmful, does not cause harm to an individual’s security of the person interests to the extent that s 7 is violated.

#### e. Testing

Security of the person includes the right to protect bodily integrity. Testing, that is taking samples of bodily fluids, can violate s 7 if it is done without consent.<sup>108</sup> Anyone who agrees to the CADP consents to testing; however, it can be questioned whether or not everyone knows the full extent of the right they are waiving, such as those athletes competing at the provincial level who do not need to complete the mandatory anti-doping training that makes it clear what the testing process entails.<sup>109</sup>

Refusing to submit to testing results in an anti-doping rule violation. This raises the question of whether or not consenting to testing is coerced or freely given if athletes

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eight) after a second positive drug test. In Canada, athletes like rower Silken Laumann continued to compete even after testing positive in 1995 for a banned substance she attributed to cold medication.<sup>107</sup> CADP, *supra* note 23 at 10.12.1: “An athlete or other person subject to a period of ineligibility longer than four years may, after completing four years of the period of ineligibility, participate as an athlete in local sport events not sanctioned or otherwise under the jurisdiction of a [WADC] signatory or member of a WADC signatory, but only so long as the local sport event is not at a level that could otherwise qualify such athlete or other person directly or indirectly to compete in (or accumulate points toward) a national championship or international event, and does not involve the athlete or other person working in any capacity with minors.”

<sup>108</sup> Holmes & Richer, *supra* note 7 at 7, noting that the cases where bodily fluids have been taken without consent have been in the context of penitentiaries and impaired driving laws.

<sup>109</sup> E.g., Doucette argued that he did not consent to the CADP when he bought his racing licence with Bicycle Nova Scotia, and thus was unaware that he could be subject to drug testing. See SDRCC DT-18-0294 *Canadian Centre for Ethics in Sport v Greg Doucette*, (2018) Sport Dispute Resolution Centre of Canada (Arbitrator Allan Stitt), online: SDRCC, <[www.crdsc-sdrcc.ca/resource\\_centre/pdf/English/879\\_SDRCC%20DT%2018-0294.pdf](http://www.crdsc-sdrcc.ca/resource_centre/pdf/English/879_SDRCC%20DT%2018-0294.pdf)> [Doucette]. As discussed in Chapter 2.4.c, ignorance is not a defence to anti-doping rule violations, or offences generally. See also Kathryn Henne, “WADA, the Promise of Law and the Landscapes of Antidoping Regulation” (2010) 33:2 *Political and Leg Anthropology Rev* 306 at 320.

are penalized for not submitting to a test. In *Stillman*, the Supreme Court held that samples taken without consent of the accused did not contravene the *Charter*, in part because the accused's dignity or bodily integrity was not interfered with during the sample collection.<sup>110</sup> In *Deacon*, the Federal Court of Appeal ruled that requiring someone to take medication as a condition of their release does not violate s 7 as long as the legislation authorizing the order was reasonable and accorded with principles of fundamental justice.<sup>111</sup> Both of these cases show that a lack consent does not automatically infringe security of the person. An additional consideration with respect to the CADP is that the athlete has consented to the CADP, and thus has consented that refusing to submit to a test constitutes an anti-doping rule violation. Further, information is easily available on the CCES website, so anyone with internet access can complete anti-doping modules online and find out precisely what they waive when they consent to the CADP.<sup>112</sup> This indicates that the CADP's requirement that athletes submit to drug tests or face an anti-doping rule violation will not violate security of the person if the CADP itself is reasonable and accords with principles of fundamental justice.

#### f. Mandatory Testing and Principles of Fundamental Justice

Like the Prohibited List, it is unlikely that mandatory testing reaches the threshold for a s 7 infringement, but on the slim chance it does, mandatory testing is not counter to principles of fundamental justice by being vague, arbitrary, overbroad, or grossly disproportionate.

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<sup>110</sup> *R v Stillman*, [1997] 1 SCR 607, 185 NBR (2d) 1.

<sup>111</sup> *Deacon v Canada (Attorney General)*, 2006 FCA 265, 352 NR 380.

<sup>112</sup> See e.g., Canadian Centre for Ethics in Sport, "Course Outline: True Sport Clean 101" (last visited 24 September 2019), online: CCES <cces.ca/course-outline>.

The requirement that athletes submit to drug testing is not arbitrary because there is a clear nexus between testing and ensuring that sport is drug free. It is not overbroad because not every single participant is subject to testing. Individuals may be chosen based on their finish position at events, if they are part of the registered testing pool, or through targeted testing. Under the CADP, the CCES performed 3,547 tests between April 1, 2017, and March 31, 2018; even if that number represents the number of individuals tested (i.e., it does not count tests for athletes who are tested multiple times more than once), that is a small percentage of Canadians who participate in organized sport.<sup>113</sup> Testing is the means to an end (that is, determining whether or not an athlete has used banned substances to enhance their performance); while testing is a response to the problem of doping in sports, it is not grossly disproportionate, particularly because it is perhaps the only way to determine if an ADRV has occurred. This is contrary to cases like *Dion* and *Jackson*, where forcing inmates to provide urine samples without any standard or criteria was found to contravene principles of fundamental justice because the testing was required solely based “on the subjective determination of a Correctional Service employee.”<sup>114</sup> Mandatory testing under the CADP does not violate s 7 in a manner that is inconsistent with principles of fundamental justice because it is not arbitrary, overbroad, or grossly disproportionate.

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<sup>113</sup> CCES, *Annual Report*, *supra* note 55 at 16. The total number of individuals the CCES tested (including the fee-for-service testing) is 5,317. Statistics Canada reports that more than 8 million Canadians participate in sport regularly. See Statistics Canada, *Regular Participation in Sports by Sex and Other Demographic Characteristics* (Ottawa: Statistics Canada, 2017), at table 13-10-0603-01, online: *Statistics Canada*, <[www150.statcan.gc.ca/t1/tb11/en/tv.action?pid=1310060201](http://www150.statcan.gc.ca/t1/tb11/en/tv.action?pid=1310060201)>.

<sup>114</sup> Holmes & Richer, *supra* note 7 at 7, citing *Dion*, *supra* note 94 and *Jackson v Joyceville Penitentiary*, [1990] 3 FC 55 (TD).

#### g. Mandatory Provisional Suspension and Mandatory Minimum Sanctions

The CADP has mandatory minimum sanctions for first- and second-time offences. For most anti-doping rule violations, a two-year or four-year sanction is imposed for a first offence and a four- or eight-year sanction or lifetime ban imposed for the second offence.<sup>115</sup> When an ADRV has been asserted, a mandatory provisional suspension is immediately in effect, which prohibits an athlete from participating in competitions or team training until the anti-doping tribunal hears their case, and voids all of their results from the time of the ADRV forward.<sup>116</sup> The mandatory provisional suspension is applied before any inquiry has been made into moral blameworthiness. Moral blameworthiness is not considered until the doping tribunal considers and imposes sanctions.

Mandatory provisional suspensions potentially infringe the right to liberty because athletes are sanctioned without regard to any element of fault. This is contrary to the requirement in *Re BC Motor Vehicle Act*: severe sanctions should only be imposed if there is moral blameworthiness.<sup>117</sup> Sanctioning athletes before they have the opportunity to present their case means that athletes who may have unintentionally ingested a prohibited substance (for example, from tainted supplements) are punished regardless of their moral blameworthiness. A lack of moral blameworthiness, however, does not mean individuals cannot or should not be sanctioned. Cases like *R v Suter* demonstrate that even no (or very limited) moral blameworthiness does not mean sanctions will not apply.<sup>118</sup> Suter refused to give a breath sample after he drove his vehicle into a restaurant patio and killed a two-year-old. His state-provided lawyer advised against giving a breath

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<sup>115</sup> CADP, *supra* note 23 at 10.

<sup>116</sup> *Ibid* at 7.9.

<sup>117</sup> *Re: BC MVA*, *supra* note 65.

<sup>118</sup> 2018 SCC 34, [2018] 2 SCR 496.

sample. It was eventually determined that Suter was not impaired at the time of the accident. Suter was originally sentenced to four months' imprisonment and a 30-month driving prohibition. The Court of Appeal extended the carceral sentence to 26 months. The Supreme Court reduced the carceral sentence to the time Suter had already served after balancing the severity of the offence against Suter's moral blameworthiness (which included relying on incorrect legal advice and the factual finding of non-impairment) and the legislative objectives behind refusal offences.<sup>119</sup>

Provisional sanctions may not be as severe as the sanction eventually applied,<sup>120</sup> and neither provisional nor mandatory sanctions likely meet the threshold of a s 7 violation of liberty or security of the person. While the personal consequences of an ADRV can be huge for ineligible individuals (they have their results voided and are barred from participating for a minimum period of time), they are not imprisoned, nor are they given exorbitant fines. Their livelihood may be affected, but s 7 does not protect the right to personal property—including income; losing income (or the ability to lose income) does not constitute a *Charter* breach. Perhaps the only sanction that would reach the threshold of moral blameworthiness required by *Re: BC Motor Vehicle Act* is a lifetime ban, but there are no fines or threats of imprisonment in the CADP sanctions.

Canadian courts have struck down mandatory minimum sentences in the criminal law context as being constitutionally unsound where the minimum sentence is disproportionate to the gravity of the offence and the responsibility of the offender.<sup>121</sup> Not

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<sup>119</sup> “Refusal offences” make it an offence to refuse to give breath samples.

<sup>120</sup> CADP, *supra* note 23 at 10.5.

<sup>121</sup> See e.g., *R v Nur*, 2015 SCC 15, [2015] 1 SCR 773 [*Nur*]; *R v Lloyd*, 2016 SCC 13, [2016] 1 SCR 130. See also Sarah Chaster, “Cruel, Unusual, and Constitutionally Infirm: Mandatory Minimum Sentences in Canada” (2018) 23 Appeal 89 at 91.

all mandatory minimum sentences are unconstitutional. Although mandatory minimum sanctions are a part of the CADP and, for some ADRVs, do not allow for any discretion in varying the length of the sanction,<sup>122</sup> it is unlikely that the mandatory minimums in the CADP reach the level of disproportionality that would make them unconstitutional. The sanctions in the CADP do not include imprisonment, so there is no physical liberty interest at stake. While an individual's ability to make an income from sport may also be affected by an anti-doping rule violation and subsequent sanction, loss of income is not protected by the *Charter* in terms of infringing of security of the person.

#### h. CADP Sanctions and Principles of Fundamental Justice

Although it is doubtful that the minimum or mandatory sanctions in the CADP would rise to the level of a s 7 liberty or security of the person violation, that violation would need to occur in a manner that does not accord with principles of fundamental justice. There is a slim chance that the CADP sanctions could be considered grossly disproportionate and therefore not accord with principles of fundamental justice. Laws that are grossly disproportionate are “state actions or legislative responses to a problem that are so extreme as to be disproportionate to any legitimate government interest.”<sup>123</sup> The sanctions need to be completely out of sync with the objective in order for the law to be disproportional enough to violate a principle of fundamental justice. In *Bedford*, the bawdy house prohibition was found to be grossly disproportionate because its harmful effects prevented sex workers from taking measures that could decrease the risk to their health and safety.<sup>124</sup> In *Nur*, the mandatory minimum sentence of five years’

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<sup>122</sup> CADP, *supra* note 23 at 10.7. See also *Doucette*, *supra* note 109 at para 85: “The CADP clearly sets out the length of the suspension and does not give me discretion to alter it.”

<sup>123</sup> *PHS*, *supra* note 60 at para 133, *Malmo-Levine*, *supra* note 92.

<sup>124</sup> *Bedford*, *supra* note 48; Sharpe & Roach, *supra* note 63 at 268.

imprisonment for possessing a prohibited or restricted firearm was found to be unconstitutional on the basis it was grossly disproportionate.<sup>125</sup>

CADP sanctions for ADRVs include two-year, four-year, and lifetime bans from participating in sport. Four-year or lifetime bans might be argued as being grossly disproportional because these sanctions are applied regardless of the age or competitive level of the individual. They are also applied regardless of the sport, which is more harmful to athletes in sports that typically have shorter careers.<sup>126</sup> However, when considering the objectives of the CADP (that is, preventing doping in sport and protecting the health of athletes), a two- or four-year ban likely does not meet the threshold of gross disproportionality because these penalties are not broader than necessary to meet the CADP's objectives. Lifetime bans are more disproportional in that they are effectively career-ending, but they are not applied to first offences, which lessens their disproportionality because individuals have two strikes before they are completely ineligible. Sanctioning a non-elite athlete or minor athlete seems to be more disproportionate than sanctioning an elite athlete because it negatively affects the social benefits of participating in sport, but even that is unlikely to rise to the level of being grossly disproportionate, particularly as noted earlier, athletes may compete in local events that do not fall under the CADP after four years of ineligibility have passed.<sup>127</sup>

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<sup>125</sup> *Nur*, *supra* note 121.

<sup>126</sup> E.g., sports like cycling and cross-country skiing typically have longer careers than sports like gymnastics. See also Barrie Houlihan, "Civil Rights, Doping Control and the World Anti-doping Code" (2004) 7:3 *Sport in Society* 420 at 428. See also Jan Exner, "Anti-Doping and Athletes' Rights under EU Law: Four-Year Period of Ineligibility as Disproportionate Sanction?" (2018) 17 *Intl Sports LJ* 128.

<sup>127</sup> CADP, *supra* note 23 at 10.12.1.



## i. Procedural Fairness and Principles of Fundamental Justice

Section 7 of the *Charter* protects procedural fairness, which includes knowing the case against you and having the opportunity to respond. If, for example, mandatory provisional suspensions are found to breach liberty or security of the person, it would need to happen in a manner that accords with principles of fundamental justice. For example, because individuals are provisionally suspended before their anti-doping hearing happens, they could attempt to argue that provisional suspensions violate procedural fairness because athletes are sanctioned before they have a chance to present their case. Both *Dodds* and *Gray* attempted to challenge anti-doping policies on the basis that s 7 liberty interests were denied because the anti-doping process did not ensure procedural fairness.<sup>128</sup> *Gray*'s procedural fairness argument failed because the court found he had not availed himself of the opportunities provided to object to his test results, and he declined the offer of an earlier hearing with the Canadian Track and Field Association.<sup>129</sup> *Dodd*'s s 7 argument failed because the arbitrator did not agree that an athlete's ability to compete met the threshold for a *Charter* liberty interest, and because the arbitrator found that procedural fairness was not denied because athletes knew in advance that the Canadian Weightlifting Federation tested athletes prior to events.<sup>130</sup>

Arbitrator Delisle stated:

To insist that the athlete have the right to immediately protest the results of his testing and to process that protest fully to enable him to compete is unrealistic. If a person is convicted of a crime at trial, we do not say that he was deprived of his liberty contrary to principles of fundamental justice because his right to appeal is not instantaneous. Appeal processes of necessity take time. In the result, I cannot say that the process has denied

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<sup>128</sup> *Dodds*, *supra* note 90; *Gray v Can Track and Field Assn* [1986], 39 ACWS (2d) 483, 1986 CarswellOnt 2878 (Ont HCJ) [*Gray*].

<sup>129</sup> *Gray*, *ibid*, at 3.

<sup>130</sup> *Dodds*, *supra* note 90 at 3.

the grievor any protection flowing from principles of natural justice of from s.7 of the *Charter*.<sup>131</sup>

Both Dodds and Gray challenged anti-doping policies in the 1980s. Canada's first anti-doping policies may not have passed muster on procedural fairness considering the only route of appealing anti-doping sanctions was directly to the Minister of State for Fitness and Amateur Sport.<sup>132</sup> However, the 2015 CADP has procedural safeguards, such as notice and timelines, built into it. Additionally, anti-doping disputes are handled by the Sport Dispute Resolution Centre of Canada, which also has procedural safeguards built into its procedural code.<sup>133</sup> The procedural elements, such as notice and timelines, of the CADP (and by extension, the SDRCC) are not at issue with respect to s 7, but there are two potential issues that could raise questions about a lack of procedural fairness; these are the waiver of alternative relief required by the SDRCC, and the standard of proof required by the CADP (that of "comfortable satisfaction").

The CADP requires that all anti-doping disputes be adjudicated by either the SDRCC or the Court of Arbitration for Sport (CAS). Athletes consent to the jurisdiction of the SDRCC when they become members of a national sport organization and when they consent to the CADP.<sup>134</sup> Athletes may not know that when they consent to the

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<sup>131</sup> *Ibid* at 3.

<sup>132</sup> Rob Beamish, "Olympic Ideals versus the Performance Imperative: The History of Canada's Anti-Doping Policies" in Lucie Thibault & Jean Harvey, eds, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013), 217 at 224.

<sup>133</sup> E.g., CADP, *supra* note 23 at 8; World Anti-Doping Agency, *World Anti-Doping Code 2015* (with 2018 Amendments) (Montreal: WADA, 2018) at 8; Sport Dispute Resolution Centre of Canada, *Canadian Sport Dispute Resolution Code* (in force from 1 January 2015), at Art 7.2, online: *SDRCC*, <[www.crdsc-sdrcc.ca/eng/dispute-resolution-code](http://www.crdsc-sdrcc.ca/eng/dispute-resolution-code)> [SDRCC Code].

<sup>134</sup> E.g., The Athlete Assistance Program agreement requires athletes to consent to the CADP. Athletes who are not members of provincial or national sport organizations may be able to avoid the jurisdiction of the SDRCC, e.g., *Adams v Ontario Cycling Association*, 2018 HRTO 548 [*Adams 2018*]. The BC Labour Board also heard a sports-related dispute in BCLRB No B2/2019 *Canadian Rugby Union (Federation Canadienne De Rugby) v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-1937*, 2019 CanLII 878 (BC LRB) [*Canadian Rugby*]. In that case, the issue was whether or not rugby players could form a union.

jurisdiction of the SDRCC, they also waive their right to alternative relief.<sup>135</sup> This waiver is part of the SDRCC's procedural code and is not disclosed anywhere in the CADP.<sup>136</sup> Individuals challenging an ADRV at the SDRCC can appeal the SDRCC's decision to the CAS and the CAS allows appeals to the Swiss federal court.<sup>137</sup> The issue here is losing access to Canadian courts, rather than a lack of procedural fairness.<sup>138</sup> That said, mandatory arbitration agreements, including agreements that require sport disputes be arbitrated at the CAS have been upheld as valid.<sup>139</sup> *Adams 2011* also shows that Canadian courts are willing to uphold athlete agreements that bind them to hear disputes at the SDRCC.<sup>140</sup> It is unlikely that the CADP requirement for anti-doping disputes to be heard at the SDRCC amounts to a s 7 infringement that does not accord with principles of fundamental justice.<sup>141</sup>

The “comfortable satisfaction” standard of proof is perhaps the only part of the CADP that suffers from vagueness. “Comfortable satisfaction” is not as easy to

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<sup>135</sup> SDRCC Code, *supra* note 133 at Art 6.6.

<sup>136</sup> The SDRCC Code may not be considered “prescribed by law” as it is developed by the SDRCC and would likely be categorized as more administrative in nature than legislative or regulatory.

<sup>137</sup> But note limitations to appeals from the CAS to the Swiss Federal Tribunal are limited to issues such as lack of jurisdiction, a violation of elementary procedural rules, or the CAS decision is incompatible with public policy. See Court of Arbitration for Sport, “Frequently Asked Questions” (last visited 11 September 2019), online: CAS, <[www.tas-cas.org/en/general-information/frequently-asked-questions.html](http://www.tas-cas.org/en/general-information/frequently-asked-questions.html)>.

<sup>138</sup> The lack of notice regarding the waiver of alternative relief could possibly violate procedural fairness, but that challenge would be the SDRCC, not the CCEs or the CADP. Additionally, as discussed in *Doucette*, *supra* note 109, ignorance is not a defence.

<sup>139</sup> E.g., Mandatory arbitration clauses in labour agreements have been upheld. See *Weber v Ontario Hydro*, [1995] 2 SCR 929, 24 OR (3d) 358. But not all mandatory arbitration clauses are upheld. E.g., *Telus Communications v Wellman*, 2019 SCC 19. Telus's mandatory arbitration clause was superseded by provincial consumer protection legislation. That said, Jean-Paul Costa, *supra* note 52 at 10, in his opinion on the 2015 WADC also did not find that arbitration at the CAS raised any problems for athletes' rights.

<sup>140</sup> *Adams 2011*, *supra* note 90 at paras 27-44.

<sup>141</sup> Another element of the SDRCC procedural code that may not accord with principles of fundamental justice is the fact that all hearings conducted by the SDRCC are done so in private. The CADP does not require anti-doping hearings to be conducted in private, so anyone contesting an ADRV does not have the right to a public hearing. The European Court of Human Rights, while affirming the legitimacy of the CAS, noted that its denial of a request for a public hearing violated Article 6 of the *European Convention of Human Rights*. The denial of a public hearing is discussed further under s 11(d).

understand as the civil law standard, balance of probabilities, or the criminal law standard, beyond a reasonable doubt; it fits somewhere between the two. The CADP analogizes “comfortable satisfaction” to the standard required for professional misconduct, without citing any cases that have been decided based on that standard.<sup>142</sup> Michael Straubel, a law professor at Valparaiso University, speculates the first use of the standard was in an Australian divorce case from 1938, in which the Australian Supreme Court sought to establish an appropriate standard of proof for divorce proceedings, and later adopted that standard into professional misconduct and other hearings, though he points out it was never adopted for criminal or quasi-criminal cases.<sup>143</sup>

Another non-standard standard of proof used in Canada is that of “enhanced balance of probabilities.” This standard is has been used by the Ontario Consent and Capacity Board, and been described as, “sufficient proof to significantly tilt the scales.”<sup>144</sup> For example, in order for a patient to be involuntarily detained, a physician must show on a balance of enhanced probabilities that the patient meets the conditions for involuntary detainment under the *Mental Health Act*.<sup>145</sup> The Supreme Court of Canada has not debated whether or not an “enhanced balance of probabilities” suffers from vagueness. The Ontario Superior Court has likened “substantial likelihood” to that

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<sup>142</sup> CADP, *supra* note 23 at Comment to Rule 3.1. The WADC, *supra* note 133 at Comment to Art 3.1 also analogizes the standard to that of professional misconduct. A search of “comfortable satisfaction” on CanLII did not yield any results of decisions that used that standard. The only case that used the phrase “comfortable satisfaction” on WestlawNext was a divorce case from 1956, which quoted a decision saying there must be a “comfortable satisfaction that the tribunal has reached both a correct and just conclusion.” See *Dorey v Demone*, 3 RFL Rep 124 at para 14, 6 DLR (2d)296. Presumably, the CADP has adopted the analogy from the WADC.

<sup>143</sup> Michael Straubel, “Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can do its Job Better” (2005) 36:4 Loy U Chicago LJ 1203 at 1266-67, citing *Briginshaw v Briginshaw* (1938) 60 CLR 336.

<sup>144</sup> *X (Re)*, 2003 CanLII 54895 (ON CCB) at para 36, 2003 CarswellOnt 8230.

<sup>145</sup> *Ibid* at para 35. But see *Starson v Swayze*, 2003 SCC 32, [2003] 1 SCR 722, where the civil standard of proof was used.

standard,<sup>146</sup> which indicates that enhanced balance of probabilities is an intelligible standard, despite deviating from the standard civil and criminal law standards of proof.

Although commentators have criticized the lack of precision as to what “comfortable satisfaction” entails, it has not stopped doping tribunals at the SDRCC or CAS from adjudicating anti-doping cases because the tribunal itself did not understand the standard, which confirms that “comfortable satisfaction” yields an intelligible standard—at least to those adjudicating anti-doping disputes. Further, Costa, in his review of the 2015 WADC was asked to address the question of whether WADA should use the balance of probabilities standard or comfortable satisfaction; in phrasing the question, WADA pointed out the CAS has been using the standard since at least 1996, and the Swiss Federal Tribunal upheld the standard in a 2009 decision (which concluded using that standard did not violate public policy).<sup>147</sup> Costa concluded that the standard did not raise issues of “real compatibility.”<sup>148</sup> “Comfortable satisfaction” does not suffer from vagueness to the extent that it violates a principle of fundamental justice.

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<sup>146</sup> See e.g., *R v Wong*, [2008] OJ No. 51 at paras 15, 87, WCB (2d) 838: “In *The Law of Bail in Canada*, Professor Trotter, (as he then was), states that the proper and accepted approach to the “substantial likelihood” of future offences or interference with the administration of justice test is a slightly enhanced balance of probabilities standard.” The Supreme Court discussed the meaning of “substantial likelihood” in *R v Morales*, [1992] 3 SCR 711, 77 CCC (3d) 91.

<sup>147</sup> Jean Paul Costa, “Opinion for the World Anti-Doping Agency (WADA), September-October 2017” (14 December 2017), at 4-5 online: *WADA*, <[www.wada-ama.org/en/resources/legal/legal-opinion-on-the-isccs-by-judge-jean-paul-costa](http://www.wada-ama.org/en/resources/legal/legal-opinion-on-the-isccs-by-judge-jean-paul-costa)>. Costa cited *Korneev and Gouliev v IOC*, CAS (Atlanta) no 003-4L (August 1996) and *Pechstein v ISU* 4A\_612/2009, 10 February 2010, para 6.3.2: “The view of the Arbitral Tribunal that the Respondent must prove a doping offence ‘to the comfortable satisfaction of the hearing panel’ does not violate public policy.”

<sup>148</sup> Costa 2017, *ibid*, at 11-12. What Costa identified as a problem (rather than the “comfortable satisfaction” standard of proof) was whether or not bodies like the CAS should have the jurisdiction and freedom to develop their own standards of proof, which he ultimately concluded they should if they are to maintain their independence.

## j. Section 1 Analysis for Section 7 Infringements

In order for s 7 to be violated, the infringement of life, liberty, or security of the person must occur in a manner that is contrary to principles of fundamental justice. A majority of the Supreme Court has never held that a violation of s 7 was demonstrably justifiable under s 1—the court has acknowledged that such a case would arise only from “exceptional conditions.”<sup>149</sup>

The CADP does not violate s 7 to the extent that s 7 rights are infringed in a manner that does not accord with principles of fundamental justice. Although elements of the CADP inhibit liberty and security of the person interests, they do not rise to the threshold required to violate s 7. Accordingly, no s 1 analysis is required (or performed) for the potential s 7 infringements discussed above.

## 6. Section 8: Unreasonable Search or Seizure

Unannounced, out-of-competition testing of athletes in the registered test pool performed under the CADP may possibly infringe s 8 of the *Charter*. Blood and urine tests are used to determine if an anti-doping rule violation has occurred. For athletes in the registered testing pool, testing is not a one-off occurrence. Rather, it happens regularly in and out of competition, and the results are stored and tracked in a database as part of the Athlete Biological Passport program (ABP). The ABP uses biological markers from blood tests to look for evidence of doping through variations in the biological markers. This allows anti-doping organizations to assert an anti-doping violation has occurred without a

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<sup>149</sup> Sharpe & Roach, *supra* note 63 at 247.

positive drug test.<sup>150</sup> Data from the ABP program is also shared internationally with WADA and other NADOs.<sup>151</sup>

Athletes concede to drug testing when they agree to be bound by the CADP, whether this be through the membership agreement with their NSO, their agreement with Sport Canada through the Athlete Assistance Program, or through a participation agreement for major events.

Section 8, the right to be secure against unreasonable search or seizure protects against unjustified intrusions of someone's privacy before an unjustified search happens.<sup>152</sup> The privacy interests covered by s 8 include personal, territorial, and informational privacy.<sup>153</sup> In order for a s 8 violation to occur, there needs to be a search or seizure, and the search or seizure needs to be unreasonable. Inspecting or taking something (for example, urine or blood) is considered a search or seizure if the individual has a reasonable privacy interest in the object or subject matter that has been scrutinized or taken.<sup>154</sup> Not all searches or seizures are unreasonable. If the search or seizure was authorized by law, the law itself is reasonable, and the search or seizure was done in a reasonable manner, s 8 is not engaged.<sup>155</sup> The s 8 test is contextual and relates to different expectations of privacy that may be at play.<sup>156</sup>

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<sup>150</sup> World Anti-Doping Agency, *Athlete Biological Passport: Operating Guidelines*, version 7.1 (Montreal: WADA, June 2019) at para 1.2.2, online: *WADA*, <[www.wada-ama.org/sites/default/files/resources/files/guidelines\\_abp\\_v71.pdf](http://www.wada-ama.org/sites/default/files/resources/files/guidelines_abp_v71.pdf)> [ABP Guidelines].

<sup>151</sup> *Ibid* at 15, para 2.4.

<sup>152</sup> *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 159-160, 11 DLR (4th) 641 [*Hunter*].

<sup>153</sup> *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at para 55, [2015] 3 SCR 250.

<sup>154</sup> *R v Tessling*, 2004 SCC 67 at para 18, [2004] 3 SCR 432; *R v Evans*, [1996] 1 SCR 8 at paras 11, 131 DLR (4th) 654.

<sup>155</sup> *R v Collins*, [1987] 1 SCR 265 at para 23, 38 DLR (4th) 508.

<sup>156</sup> *Hunter*, *supra* note 152 at 159-60.

Mandatory drug testing has been challenged with respect to privacy rights in the context of employment law. There is one arbitral decision concluding that athletes who receive funding from Sport Canada through the AAP as well as funding from their NSO are employees of the NSO.<sup>157</sup> One of the factors the arbitrator noted as creating an employment relationship between the athletes and the NSO was the anti-doping requirements: athletes had to comply with Rugby Canada’s anti-doping policy, refrain from using, possessing or distributing prohibited substances, and submit to unannounced drug tests.<sup>158</sup> The fact that athletes were subject to drug-testing was not an issue in this case.

Drug testing in the workplace is not uncommon: approximately 10 percent of Canadian businesses employing more than 100 people use drug testing.<sup>159</sup> It is often justified on the basis of health and safety reasons.<sup>160</sup> Cases challenging drug testing regimes in the workplace have resulted in a case-by-case analysis that balances the employee’s right to privacy against health and safety concerns of the public and the workplace.<sup>161</sup> For example, in *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*,<sup>162</sup> the Supreme Court ruled that a unilaterally imposed mandatory drug testing regime was “an unjustified affront to the

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<sup>157</sup> *Canadian Rugby Union*, *supra* note 134.

<sup>158</sup> *Ibid* at para 40.

<sup>159</sup> DATAC, “Drug Testing in Canada—Part One” (14 November 2017), online: *DATAC*, <[datac.ca/drug-testing-canada-part-one/](http://datac.ca/drug-testing-canada-part-one/)>; Scott MacDonald, “Drug Testing in the Canadian Workplace,” (2009) 5:3 *Visions J 23*, online: *Here to Help*, <[www.heretohelp.bc.ca/visions/workplaces-vol5/drug-testing-in-the-canadian-workplace](http://www.heretohelp.bc.ca/visions/workplaces-vol5/drug-testing-in-the-canadian-workplace)>.

<sup>160</sup> MacDonald, *ibid*, Canada, Employment and Social Development Canada, “Workplace Impairment Questions and Answers” (last modified 20 June 2019), online: *Canada* <[www.canada.ca/en/employment-social-development/services/health-safety/cannabis-workplace/questions-answers.html](http://www.canada.ca/en/employment-social-development/services/health-safety/cannabis-workplace/questions-answers.html)>.

<sup>161</sup> Employment and Social Development Canada, *ibid*; see also Canada Human Rights Commission, *Impaired at Work—A Guide to Accommodating Substance Dependence* (Ottawa: CHRC, 2018) at 16, online: <[www.chrc-ccdp.gc.ca/eng/content/impaired-work-guide-accommodating-substance-dependence](http://www.chrc-ccdp.gc.ca/eng/content/impaired-work-guide-accommodating-substance-dependence)>.

<sup>162</sup> 2013 SCC 34, [2013] 2 SCR 458 [*Irving*].



dignity and privacy of employees unless there is reasonable cause, such as a general problem of substance abuse in the workplace.”<sup>163</sup> The Supreme Court reviewed more than 20 years of arbitral decisions on drug testing in the workplace, and followed their precedent in determining that there must be reasonable cause for a workplace to implement random, unannounced drug testing.<sup>164</sup> In contrast to *Irving*, a mandatory drug testing policy that required disclosing drug dependency or addiction issues was upheld in cases like *Stewart v Elk Valley Coal Corp*, and *Entrop v Imperial Oil*.<sup>165</sup> The CADP differs from drug-testing regimes in cases like *Irving* because the CADP is not unilaterally imposed: in *Irving*, the employer effectively changed the terms of the collective agreement unilaterally. While the CADP may seem unilateral, it is important to remember that anyone who is subject to the CADP has consented to it, and that consent includes the possibility of drug testing.<sup>166</sup> Additionally, the regular announcements of athletes having positive drug tests means that there is reasonable cause to impose drug testing in sports—there has certainly been more than eight incidents of doping within fifteen years.<sup>167</sup>

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<sup>163</sup> *Ibid* at paras 6 & 10. *Irving* implemented a policy where 10 percent of employees in safety sensitive positions would be subjected to random drug tests over the course of a year; a positive test result or failure to submit to a test were grounds for dismissal.

<sup>164</sup> *Ibid* at para 32. Prior to the policy being implemented, there had only been 8 incidents over 15 years of alcohol consumption or impairment, not enough meet the reasonable cause threshold; see also paras 13, 51.

<sup>165</sup> 2017 SCC 30, [2017]1 SCR 591; 50 OR (3d) 18, 189 DLR (4th) 14 (ON CA). Both of these cases challenged the required disclosure elements of the drug testing policy, not the mandatory testing, though employees in both cases were required to submit to mandatory random testing because of the safety risks in their workplaces.

<sup>166</sup> If drug testing was imposed upon all participants, without them being informed of the process, their rights, and the consequences of refusing a drug test, the issue of whether or not the testing is consensual and informed is debateable; however, that is not the case under the CADP. Presumably, if an employee knowingly joins a union where drug testing is already part of the collective agreement or is otherwise condition of employment, their consent to drug testing is both informed and implied.

<sup>167</sup> *Irving*, *supra* note 162 at para 32.

The Privacy Commission of Canada, in its 1990 report on drug testing in the workplace, touched on the role of drug testing in fitness in amateur sport.<sup>168</sup> The Privacy Commission “followed closely the proceedings of the Dubin Commission,” and found the government’s position “that federally-funded athletes should be subjected to random, mandatory and unannounced urinalysis for banned substances” was “both surprising and disappointing.”<sup>169</sup> Dubin noted, “In the context of privacy protection, the potential exists for misuse of information gained through athletic testing,” but concluded random unannounced drug testing did not violate s 8 of the *Charter* because:

In the case of drug testing under Sport Canada policy, however, Sport Canada has a right to impose conditions for funding. When an athlete agrees to the conditions, random testing is not mandatory in a true sense. It is consensual. In my opinion, drug testing under such circumstances and having regard to its valid purposes cannot be viewed as an unreasonable search contrary to the provisions of section 8 of the Charter.<sup>170</sup>

The Privacy Commission explained it found this position “surprising” because: “of the government policy rejecting drug testing in the employment setting except in circumstances where there are overriding public safety concerns,” and the Commission found Dubin’s conclusion “disappointing because it appeared to accept that Canadians’ offended national pride over the Ben Johnson affair was sufficient reason to trample upon the basic right to a reasonable expectation of privacy which athletes share with other Canadians.”<sup>171</sup>

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<sup>168</sup> Privacy Commissioner, 1990 Report, *supra* note 7.

<sup>169</sup> *Ibid* at 40.

<sup>170</sup> Charles Dubin, *Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance*, (final report of commission), Commissioner Charles Dubin (Ottawa: Minister of Supply and Services Canada, 1990) at 495 [Dubin Commission].

<sup>171</sup> Privacy Commission, 1990 Report, *supra* note 7 at 40.

The Privacy Commission chastised Dubin, saying, “One can hope that Mr. Justice Dubin will recognize that athletes should not be forced to abandon their *Charter* rights at the locker room door—no matter how many may be willing to do precisely that in order to compete in their sport.”<sup>172</sup> In the eyes of the Privacy Commission, federally funded athletes were employees, and the report suggests that should a federally funded athlete launch a *Charter* challenge against drug testing (under sections 7 or 8), “The sole matter for real debate would be whether such testing constitutes a reasonable limit on *Charter* rights ‘as can be demonstrably justified in a free and democratic society.’”<sup>173</sup> The Privacy Commission did not venture any conclusions as to whether or not athlete drug testing was demonstrably justifiable, but did question: “Where is the virtue in attaining a drug-free sports arena by sacrificing our athletes’ right to privacy? And, unless there is a virtue in it—since public safety is certainly not at risk—surely public policy should not support the quick-fix of mandatory athlete urinalysis, especially at training venues.”<sup>174</sup>

Although the later Library of Parliament reports on drug testing and privacy in the workplace do not address the question of athlete drug testing, they align with the 1990 report in that drug testing policies must balance privacy rights with public safety rights.<sup>175</sup> Anti-doping in sports has more at stake than just public safety—protecting the integrity of sports and the health of athletes are the stated objectives behind the CADP, and those objectives are at risk of failing without a drug-testing regime in place.

The CADP probably does not even fail the first step of the s 8 test: the Supreme Court in *R v Dyment* said, “the essence of a seizure under s 8 is the taking of a thing from

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<sup>172</sup> *Ibid* at 40.

<sup>173</sup> *Ibid* at 41.

<sup>174</sup> *Ibid* at 41.

<sup>175</sup> Holmes, *supra* note 7; Holmes & Richer, *supra* note 7.

a person by a public authority without that person's consent."<sup>176</sup> While taking samples of bodily fluids like urine or blood undoubtedly meets the "taking of a thing" element of that definition, it does not happen without consent. The second step of the test—showing that the seizure is unreasonable—is also hard to meet, because the CADP needs to function as a law, the CADP needs to be unreasonable, and the search needs to be done in an unreasonable manner.

Forgetting, for the sake of argument, that the athlete's consent to testing undermines the entire s 8 claim, the CADP still does meet the threshold of a s 8 violation when looking only at the second step of the test (even though it clears the first hurdle of being a law). Although the CADP is not statutory law, regulations and the common law have been found to be sources of lawful authority for s 8 search and seizures.<sup>177</sup> This chapter relies on the conclusion in Chapter 3 that the CADP is a government action on the basis it has been adopted and integrated into several Canadian sport documents, including the *Canadian Policy Against Doping in Sport—2011*.<sup>178</sup> The CADP has the effect of public regulation because of its widespread endorsement and required compliance across all levels of the Canadian sport system.

Assuming testing under the CADP meets the threshold for a seizure authorized by law, the question becomes whether or not the seizure is reasonable. While drug testing methods have been criticized for their imperfections, urine or blood tests may be the only way to test athletes.<sup>179</sup> It is unlikely that a court or arbitral panel would find a urine or

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<sup>176</sup> [1988] 2 SCR 417 at para 26, 55 DLR (4th) 503.

<sup>177</sup> *R v Caslake*, [1998] 1 SCR 51, 155 DLR (4th) 19. In this case, the Supreme Court acknowledged that the common law doctrine of search incident to arrest could authorize a search or seizure.

<sup>178</sup> CPADS-2011, *supra* note 22.

<sup>179</sup> E.g., urine tests have been criticized for their invasiveness, but Holmes & Richer point out that alternatives like hair tests may not be more reliable than urine tests, and "may be unfairly biased against

blood test unreasonable in the context of testing for performance-enhancing drugs, particularly given the fact that athletes are educated about anti-doping and drug testing, and acknowledge and consent they may have to submit to drug testing as one of the conditions of their membership to a sport organization. Although concerns have been raised about the lack of privacy in the testing process, ensuring samples are not tampered with would also likely be considered a reasonable breach of privacy undertaken to protect the integrity of the testing process, especially considering the ways people have tried to cheat when giving samples.<sup>180</sup>

Mandatory testing under the CADP balances the privacy rights of athletes against the objectives of anti-doping, which include health and safety, and protecting the integrity of sport. Given that protecting the integrity of spirit of sport is a key objective, the fact that all athletes in the registered test pool are tested in order to compete (because of policies implemented by organizations like the IOC, international sport federations, and NSOs), and given that they consent to testing as a condition of participation, testing is arguably a benefit for athletes because it helps ensure doping-free sport, not a *Charter* violation.

The reasonableness of a seizure is more questionable when looking at the Whereabouts Rule and out-of-competition testing, and the Athlete Biological Passport, rather than the actual testing method. Athletes in the registered testing pool need to provide their whereabouts information to the CCES and WADA on a quarterly basis. This is so doping control officers can show up unannounced to perform random drug

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people with coarse black hair, which contains high melanin levels, since drugs bind with melanin in the hair; see Holmes & Richer, *supra* note 7 at 5.

<sup>180</sup> See Anderson and Goodyear, *infra* note 192.

tests. Compared to drug testing at events, which is easy to predict, out-of-competition testing is, by design, unpredictable. Even though athletes consent to testing, out-of-competition testing (enabled through the Whereabouts Rule), it may seem unreasonable because not only does the CCES have a long-term, long-range record of athletes' personal details from their whereabouts information, the CCES and WADA also have a long-term record of athletes' biological markers through the ABP. Doping-control authorities take personal information and biological samples from athletes, and maintain a long list of those samples and continue to reuse that recorded information.

The rationale behind out-of-competition testing is easy to understand: NADOs, in theory, have a better chance of catching dopers when they do not know when they will be tested. If an athlete knows when they are going to be tested, they can plan their doping regime accordingly so as not to produce a positive test result.<sup>181</sup> While out-of-competition testing was part of the 1983 and 1985 anti-doping policies, there was very little out-of-competition testing actually done; one of the recommendations in the Dubin Commission was to increase the incidence of out-of-competition testing.<sup>182</sup>

The rationale behind the ABP is to detect doping even if an athlete has not returned a positive test. The goal is to preserve the integrity of sport through a method that looks for slight variances or cues that could indicate doping, despite the lack of tests corroborating this circumstantial evidence. Like the whereabouts objective, the ABP's overarching objective is to preserve the spirit of sport and remove doping from sports.

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<sup>181</sup> E.g., Dubin criticized the “fallacy of in-competition testing,” pointing out that athletes could plan around drug-testing at competitions. He recommended that out-of-competition testing be increased significantly to better catch doping. See Dubin Commission, *supra* note 170 at 394-401, 541 (recommendations 14-15).

<sup>182</sup> E.g., *ibid* at 571: “it is disturbing to note that a large part of the funds provided to the CTAF by Sport Canada in 1989 for out-of-competition testing appears to have been spent merely to attend an international symposium on doping control held in Stockholm, Sweden.”

While providing whereabouts information and requiring athletes in the registered testing pool to submit to unannounced out-of-competition testing may not seem reasonable at first glance,<sup>183</sup> the reasons behind out-of-competition testing, combined with the fact that not every athlete is subject to this higher level of scrutiny makes this provision in the CADP seem more reasonable than it initially suggests.<sup>184</sup> Likewise, only athletes in the registered testing pool are tracked through the ABP, limiting the biggest intrusions to privacy to those athletes competing at the highest levels. The WADA also has guidelines that NADOs must follow to protect the privacy interests and information of athletes in the registered test pool, which gives athletes some assurance that their personal and private information is protected.<sup>185</sup>

Marie Overbye, a professor of sport management at Stirling University, notes that while the incidence of testing has increased, the number of positive tests has not increased.<sup>186</sup> This raises questions about the efficacy of anti-doping, particularly with respect to whereabouts requirements and out-of-competition testing. But it is hard to ignore the rationale and the aims behind out-of-competition testing—even if may not be

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<sup>183</sup> Under s 7, the analysis looks more at the effects on the Whereabouts Rule as to how it potentially affects liberty interests because of how athletes have set parameters around their schedule in order to accommodate drug testing. Under 8, the focus of the Whereabouts Rule is more on the actual testing element and whether or not unannounced out-of-competition testing is reasonable.

<sup>184</sup> The case law acknowledges there is some overlap between the analyses under s 8 and under s 1. Cases such as *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink*, 2002 SCC 61 at para 46, [2002] 3 SCR 209 suggest that a breach of s 8 is unlikely to be justified under s 1.

<sup>185</sup> E.g., World Anti-Doping Agency, *World Anti-Doping Code International Standard: Protection of Privacy and Personal Information* (Montreal: WADA, June 2018), online: *WADA*, <[www.wada-ama.org/en/resources/data-protection/international-standard-for-the-protection-of-privacy-and-personal](http://www.wada-ama.org/en/resources/data-protection/international-standard-for-the-protection-of-privacy-and-personal)>. Evaluating the effectiveness or adequacy of these guidelines is beyond the scope of this analysis.

<sup>186</sup> Marie Overbye, “Doping Control in Sport: An Investigation of How Elite Athletes Perceive and Trust the Functioning of the Doping Testing System in their Sport” (2016) 19 *Sport Management Rev* 6 at 8; see also Efverström et al., *supra* note 89. Both of these articles discuss athletes not having a lot of trust in the anti-doping system globally, and note that athletes perceive differences in how anti-doping is practised from country to country.

as successful as hoped at catching cheaters, it is still catching some. The deterring effect of the whereabouts program and out of competition may be hard to measure, but it is also hard to measure if and by how much doping would increase if the threat of random testing was lifted altogether.<sup>187</sup> The unreasonableness of both the ABP and whereabouts requirements is not egregious since athletes who are subject to both regimes are informed about the process, implicitly consent to it through providing samples and whereabouts information, and expressly consent to the CADP.

The third step in determining whether or not s 8 has been violated is examining if the search has been done in a reasonable manner. A “reasonable” search is “no more intrusive than reasonable necessary to achieve its objective.”<sup>188</sup> Drug and alcohol testing methods include blood, saliva, and urine tests, breathalyser tests, and using hair samples, though not all of these methods are used to detect doping in sports.<sup>189</sup> The Privacy Commission interprets a “reasonable” drug testing regime to be one where the program “was performed in a scientific and accurate manner, always bearing in mind the privacy concerns of the individual involved.”<sup>190</sup> An unreasonable search could be one where there is no grounds to suspect that an individual has taken drugs in breach of a proscription against them.<sup>191</sup>

When an athlete is chosen for doping control, the doping control officer stays with that individual until they produce a sample; this includes literally watching the athlete pee

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<sup>187</sup> E.g., Peter Strelan & Robert J Boeckmann, “Why Drug Testing in Elite Sport Does Not Work: Perceptual Deterrence Theory and the Role of Personal Moral Beliefs” (2006) 36:12 J Applied Social Psychology 2909. These authors found that personal moral beliefs were a bigger factor in deciding whether or not to use performance-enhancing drugs than deterrence (through drug testing and sanctions).

<sup>188</sup> *R v Vu*, 2003 SCC 6 at para 22, [2013] 3 SCR 657.

<sup>189</sup> For a brief review of urine, hair, and saliva testing methods and their efficacy, see Holmes & Richer, *supra* note 7 at 2-3.

<sup>190</sup> *Ibid* at 9.

<sup>191</sup> *Ibid* at 8, citing *Dyment*, *supra* note 176.



in a bottle to guard against any attempts by the athlete to tamper with the sample (or produce a sample that is not, in fact, theirs). Again, while it may seem unreasonable and a gross invasion of privacy to have someone witness bodily functions such as urination, it is hard to conceive of a less intrusive manner to obtain the sample and ensure it is the correct, unadulterated product, and even this is not foolproof.<sup>192</sup>

Individuals can waive s 8, as long as the consent is informed.<sup>193</sup> In *R v Wills*, the Ontario Court of Appeal established a list of six criteria to determine if a person has “consented to what would otherwise be an unreasonable search or seizure.”<sup>194</sup> It requires the Crown to establish on a balance of probabilities for each of the following that:

- i. There was a consent, express or implied;
- ii. The giver of the consent had the authority to give the consent in question;
- iii. The consent was voluntary in the sense that the word is used in *Goldman, supra*, and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
- iv. The giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;
- v. The giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and,
- vi. The giver of the consent was aware of the potential consequences of giving the consent.<sup>195</sup>

In *Simon Gillies et al v Toronto District School Board*, the Ontario Superior Court of Justice applied the *Wills* test in a civil case to determine whether or not a requirement that

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<sup>192</sup> E.g., Boxer Mike Tyson has admitted to using a fake penis to thwart doping control. See David Anderson, “Mike Tyson: I Used a Fake Willie to Fool Drug-Testers and Fought on Cocaine,” *The Mirror* (12 November 2013), online: *Mirror*, <[www.mirror.co.uk/sport/boxing/mike-tyson-used-fake-penis-2785451](http://www.mirror.co.uk/sport/boxing/mike-tyson-used-fake-penis-2785451)>. See also Sheena Goodyear, “Anti-Doping Agencies Can’t Keep Pace with the Science of Cheating,” *CBC News* (11 November 2015), online: *CBC*, <[www.cbc.ca/sports/doping-cheats-culture-1.3312294](http://www.cbc.ca/sports/doping-cheats-culture-1.3312294)>.

<sup>193</sup> *R v Borden*, [1994] 3 SCR 145, 119 DLR (4th) 74.

<sup>194</sup> 7 OR (3d) 337, 52 OAC 321 (ON CA) [*Wills*].

<sup>195</sup> *Ibid* at para 69.

students submit to a breathalyser test prior to attending their prom met the requirements of consent.<sup>196</sup>

Following the approach of the ONCA, when looking at whether or not consent to testing under the CADP is voluntary and informed, the CADP meets the requirements of the *Wills* test. Athletes expressly consent to testing when they consent to the CADP; athletes have the authority to consent to testing; consent is voluntary and not the product of oppression or coercion; the giver of consent is aware of the nature of conduct to which they are being asked to consent; the giver of consent is aware of their right to refuse; and the giver of consent is aware of the potential consequences of giving consent. National-level athletes, university athletes, and athletes competing at major events like the Canada Games must complete mandatory anti-doping training.<sup>197</sup> This training, for federally funded athletes and university athletes, must be completed each year, and in advance of major events like the Canada Games as a condition of participation.<sup>198</sup> The training session includes a section detailing how tests are completed and makes it clear that a doping control officer is with an athlete while they pass their sample. This training means that athletes have the information required to understand what it is they are consenting to, and it also eliminates any reasonable expectation of privacy they may have (that is, if

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<sup>196</sup> 2015 ONSC 1038 at para 47, 125 OR (3d) 17.

<sup>197</sup> E.g., Canadian Heritage, *Sport Canada Athlete Assistance Program Policies and Procedures*. (Ottawa: Public Works and Government Services Canada, 2015) at 12-1: “athletes must complete the CCES online anti-doping education module at the beginning of their carding cycle, and at times thereafter as required by Sport Canada. Failure to do so will result in AAP payments being withheld until requirements are completed.” See also U SPORTS, “Policies and Procedures 90—Conduct and Enforcement: U SPORTS Anti-Doping Policy (Drug Education and Doping Control)” (August 2018), online: *U Sports*, <usports.ca/uploads/hq/By\_Laws-Policies-Procedures/2018/EN/Policy\_90.10\_Drug\_Education\_%282018-2019%29.pdf> at clause 90.10.3.1.1: All U SPORTS Student-Athletes and designated athlete support personnel, in order to participate in U SPORTS National Sport activities, are required to complete anti-doping education as provided by the CCES.”

<sup>198</sup> AAP, *ibid*, at 12-1. See also Team Nova Scotia, *2019 Canada Winter Games Code of Conduct*, at clause 8: “All members of Team Nova Scotia must complete the anti-doping and drug-testing procedures information session prior to leaving for the Games.”

they know someone is going to watch them pee, they cannot claim they had a reasonable expectation to pee unobserved).<sup>199</sup>

The above discussion indicates that s 8 of the *Charter* is likely not breached by the CADP. The CADP functions as a set of regulations with which athletes and others must comply. Providing biological samples (and other personal information) is not unreasonable in light of the objectives of the CADP and its aim of deterring and eliminating doping in sport. The search is not unreasonable because athletes are aware of what the testing process entails and do not have a reasonable expectation of privacy based on the mandatory anti-doping education they complete.

### Section 1 Analysis for Section 8 Infringements

Although it is unlikely that the CADP violates s 8, performing a s 1 analysis on the CADP with respect to s 8 is still a useful exercise in that it helps to articulate the objectives behind the Whereabouts Rule and the ABP, which are two of the most intrusive provisions in the CADP.

The WADA *International Standard for Testing and Investigations* describes whereabouts information as “the means to an end, namely the efficient and effective conduct of no advance notice testing.”<sup>200</sup> The pressing and substantial objective behind whereabouts and out-of-competition testing is therefore to enable effective unannounced out-of-competition testing. The objectives behind the Athlete Biological Passport (as an

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<sup>199</sup> The CCES education portal (which requires an account to login) includes courses such as “True Sport Clean” and “The Role of Athlete Support Personnel.” See also, Canadian Centre for Ethics in Sport, “Education and E-Learning” (last visited 11 September 2019), online: *CCES*, <[www.cces.ca/education-and-e-learning](http://www.cces.ca/education-and-e-learning)>. WADA also has resources available for NADOs to train doping control officers. See World Anti-Doping Agency, *Doping Control Officer’s Training Tool Kit*, version 3.0 (Montreal: WADA, May 2011), online: *WADA*, <[www.wada-ama.org/en/resources/education-and-awareness/doping-control-officers-dco-training-tool-kit](http://www.wada-ama.org/en/resources/education-and-awareness/doping-control-officers-dco-training-tool-kit)>.

<sup>200</sup> WADA ISTI, *supra* note 77 at 38, 4.8.1.

integrated component of the entire global anti-doping system) is to “identify athletes requiring further attention through intelligent, timely interpretation of Passport data,” and to pursue anti-doping rule violations.<sup>201</sup> The operating guideline for the ABP explains the ABP “can notably be used as a complement to analytical methods to further refine and strengthen overall anti-doping strategies.”<sup>202</sup>

Whereabouts information also helps facilitate a harmonized global anti-doping strategy. Sharing whereabouts information with WADA enables athletes to be tested when they may be training abroad—something that is more feasible for WADA to coordinate as the global anti-doping watchdog, than the CCES, which does not have jurisdiction to conduct anti-doping measures overseas.<sup>203</sup>

These objectives neatly connect to the pressing and substantial objectives behind the CADP: protect the integrity of sport and the rights of clean athletes, and prevent, detect, and deter doping in sport.

The CADP may not seem to be minimally impairing in that athletes being tested have no privacy while they give their sample. However, less invasive testing methods, such as hair samples, may not be as effective, particularly when it comes to tracking how recently a prohibited substance was used.<sup>204</sup> Another way the CADP may not meet the minimally impairing standard is through the information athletes are required to disclose

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<sup>201</sup> ABP Guidelines, *supra* note 150 at 4-5, s 1.2.

<sup>202</sup> *Ibid* at 4-5, s 1.2.1

<sup>203</sup> E.g., The WADA ADAMS program enables WADA to coordinate anti-doping globally. This means that through ADAMS, Canadian athletes can be tested by other NADOs when they are training or competing abroad; likewise, CCES can test foreign athletes when they are training or competing in Canada. See World Anti-Doping Agency, “ADAMS” (last visited 11 September 2019), online: *WADA*, <[www.wada-ama.org/en/what-we-do/adams](http://www.wada-ama.org/en/what-we-do/adams)>.

<sup>204</sup> E.g., Holmes & Richer, *supra* note 7 at 2.

under the Whereabouts Rule. Unfortunately, there is no other feasible way to complete out of competition tests without that information.

The positive effects of athlete drug testing, in and out of competition, outweigh the negative effects of not testing athletes. As Dubin noted back in 1990, random out-of-competition testing may be the most effective way to catch dopers because they do not know when they will be tested. Even if out-of-competition testing has not led to a marked increase in positive tests, surely it is a better solution to eliminating doping in sports than no doping control whatsoever.

## 7. Section 11(d): Presumption of Innocence and a Fair and Public Hearing

In order for s 11 protections to be engaged, someone must be charged with an offence.<sup>205</sup> Typically, s 11 only applies to criminal or quasi-criminal proceedings; that is, offences need to have penal consequences, such as imprisonment or disproportionately high fines.<sup>206</sup> Regulatory offences that impose strict liability have been protected by s 11, even though they may not be considered a criminal proceeding, but rather because of the severity of the penalty (such as an extremely heavy fine or imprisonment).<sup>207</sup> The

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<sup>205</sup> Section 11 begins: “Any person charged with an offence has the right.” Section 11 is unique from other *Charter* provisions in that it narrows its scope to guarantee explicit protections for those charged with an offence. Strict liability is the focus here, although s 11(c), the right not to be compelled to be a witness in proceedings against that person in respect of the offence, could also apply to the CADP. The CADP itself does not force individuals to appear before the Anti-Doping Tribunal, but there is a clause in the SDRCC Arbitration Code pertaining to anti-doping cases that allows the Doping Tribunal to consider a non-appearance an admission of guilt or acceptance of the anti-doping charge. (See SDRCC Code, *supra* note 133 at 7.5.) This is contrary to the *Charter* because it means that individuals failing to appear are not even entitled to the Tribunal discussing whether or not they committed an anti-doping rule violation. While this does not compel testimony, it does mean that the stakes for not testifying are very high.

<sup>206</sup> Sharpe & Roach, *supra* note 63 at 325.

<sup>207</sup> *R v Wholesale Travel Group Inc*, [1991] 3 SCR 154, 4 OR (3d) 700 [*Wholesale Travel*] was the first strict liability regulatory offence that the Supreme Court held was constitutional. The penalties for false or misleading advertising included imprisonment or large fines. See also Rick Libman, “Is Presuming Guilt

Supreme Court distinguished regulatory offences from criminal offences in *Wholesale Travel*, explaining “criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.”<sup>208</sup> Regulatory offences like false or misleading advertising have been upheld as constitutional, as have strict liability offences in Occupational Health and Safety regimes, and under the *Export and Import Permits Act*.<sup>209</sup>

Anti-doping under the WADC has been classified by several scholars as quasi-criminal.<sup>210</sup> For example, Steffi Jose, an American lawyer, argues doping is quasi-criminal because 1) doping sanctions resemble criminal proceedings in that they are “couched in criminal law terms,” 2) sanctions are not remedial but instead “intended to punish,” 3) “doping law imposes rules on professional athletes over which they have little or no control,” thus affecting athletes’ rights, 4) “all athletes must follow the same anti-doping regulations, just as all individuals within a particular jurisdiction follow the same criminal code,” 5) “an athlete and the prosecuting agency in a doping case occupy nearly the same position as the accused and the prosecution in a criminal case in that the parties are not equal,” 6) “anti-doping agencies, in effect, function as ‘public’ or governmental

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for Regulatory Offences still Constitutional but Wrong? *R v Wholesale Travel Group* and Section 1 of the *Charter of Rights and Freedoms 20 Years After*” (2012) 43:3 Ottawa L Rev 455.

<sup>208</sup> *Wholesale Travel*, *supra* note 207 at 219.

<sup>209</sup> *Wholesale Travel*, *ibid*; *R v Ellis-Don*, [1992] 1 SCR 840, 7 OR (3d) 320; *R v Martin*, [1992] 1 SCR 838, 7 OR (3d) 19.

<sup>210</sup> E.g., Janwillem Soek, *The Strict Liability Principle and the Human Rights of Athletes in Doping Cases* (The Hague: Asser Press, 2006) at 227: “Disciplinary doping law must be considered as quasi-criminal law and should rather be termed doping chastisement law”; Rachele Downie, “Improving the Performance of Sport’s Ultimate Empire: Reforming the Governance of the Court of Arbitration for Sport” (2011) 12 Melbourne J Intl L 315 at 330-31. Costa, in his review of the 2015 WADC, said “The entirety of the subject matter of sports sanctions is civil, not criminal.” See Costa 2013, *supra* note 52 at para 13. Kaufman-Kohler et al found strict liability operated “within reasonable limits” and thus did not violate international or human rights law. See Kaufman-Kohler et al, *supra* note 25 at paras 135-140.

authorities,” and 7) “the burden of proof employed in doping cases is more stringent than the burden of proof in a breach of contract or general civil case.”<sup>211</sup> The CAS has previously admitted that “disciplinary sanctions in doping cases are similar to penalties in criminal proceedings in which the prosecutor normally bears the burden of proving not only the factual elements of an offence, but also the presence and degree of guilt on the part of the accused.”<sup>212</sup>

The consequences of anti-doping rule violations are severe for athletes in that multi-year suspensions can effectively end careers;<sup>213</sup> athletes may lose significant amounts of income from sponsors and endorsements (and lose federal funding), and may sometimes have to reimburse any monies received. The purpose of anti-doping sanctions is to deter future doping and the element of deterrence has been used to justify sanctions such as minimum four-year bans or mandatory life-time bans. These features of the CADP make it seem quasi-criminal because of its emphasis on punishment, but its aim to prevent and deter doping also make it seem like a regulatory offence in the spirit of

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<sup>211</sup> Steffi Jose, “From Sport’s Kangaroo Court to Supreme Court: How the Court of Arbitration for Sport Can Legitimize Anti-Doping Law (2014) 20 Sw J Intl L 401 at 421-22.

<sup>212</sup> E.g., CAS 2002/A/432D *Federation Internationale de Natation (FINA) Award of 27 May 2003*, (2003) Court of Arbitration for Sport (Arbitrators John Faylor, Pantelis Dedes, Denis Oswald) at para 27, online: CAS, <jurisprudence.tas-cas.org/Shared%20Documents/432.pdf#search=%22disciplinary%20sanctions%20in%20doping%20cases%20are%20similar%20to%20penalties%20in%20criminal%20proceedings%22>. See also CAS 2002/A/399 *Federation Internationale de Natation Award (FINA) of 31 January 2003*, (2003) Court of Arbitration for Sport (Arbitrators Martin Schimke, Richard McLaren, Denis Oswald) at para 22, online: CAS, <jurisprudence.tas-cas.org/Shared%20Documents/399.pdf#search=%22disciplinary%20sanctions%20in%20doping%20cases%20are%20similar%20to%20penalties%20in%20criminal%20proceedings%22>; CAS 98/222 B. *International Triathlon Union (ITU) Award of 9 August 1999*, (1999) Court of Arbitration for Sport (Arbitrators Mirko Ilesic, Christian Krähe, Olivier Carrard) at paras 26, 41, 43, online: CAS, <jurisprudence.tas-cas.org/Shared%20Documents/222.pdf>. Here, the CAS refers to doping sanctions as “quasi-penal.” Note, all of these cases occurred *before* the WADC came into effect.

<sup>213</sup> E.g., an eight-year or lifetime ban from competition, but even two- or four-year bans can have that effect in sports where athletic careers are typically shorter.

*Wholesale Travel*'s classification of preventing future harm and enforcing minimum standards of care.

a. 11(d): Presumption of Innocence

The presumption of innocence means that someone is innocent until proven guilty.

Section 11(d) protects the right “to be presumed innocent until proven guilty according to law in a fair and public hearing by and independent and impartial tribunal”<sup>214</sup>; strict- and absolute-liability offences do not allow for a presumption of innocence and therefore infringe the *Charter*. The CADP is a strict liability regime.<sup>215</sup> The *Canadian Law Dictionary* defines strict liability (in the context of regulatory offences) as offences where “the Crown is required to prove the actus reus of the offence, after which the accused can avoid conviction by proving, on a balance of probabilities, that he or she was not negligent.”<sup>216</sup> Absolute liability is defined as “The imposition of liability without fault. [...] a type of regulatory offence in which liability is based on proof that the accused committed the prohibited act.”<sup>217</sup> The *Canadian Law Dictionary* distinguishes absolute liability offences from strict liability offences by pointing out “absolute liability offences do not afford the accused the defence of due diligence or mistake of fact.”<sup>218</sup> The definition for absolute liability includes the note that, “Because of the possible harshness of holding people absolutely accountable, the courts will only interpret a regulatory offence as being one of absolute liability if there is a clear indication that the legislature

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<sup>214</sup> *Charter*, *supra* note 13 at s 11(d).

<sup>215</sup> CADP, *supra* note 23 at Comment to Rule 2.1.1.

<sup>216</sup> Steve Coughlan, *Canadian Law Dictionary*, 7th ed (Hauppauge, New York: Barron's, 2013) *sub veto* “strict liability.”

<sup>217</sup> *Ibid.*, *sub veto* “absolute liability.”

<sup>218</sup> *Ibid.*



intended it to be an absolute liability offence.”<sup>219</sup> Strict liability regimes have been upheld as constitutional in cases such as impaired driving and anti-hate laws.<sup>220</sup> Strict liability has not been upheld in cases related to drug trafficking laws or the accuracy of breathalyzers.<sup>221</sup> So, depending on the context, violations of s 11(d) are sometimes justified under s 1 of the *Charter*, but not all the time.

Regulatory regimes often include strict liability offences, which have been upheld as constitutional. Sharpe and Roach note,

Regulatory offences are at the other end of the seriousness spectrum. They are enacted to enforce non-criminal behaviour with regard to matters that are not inherently unlawful but that require standards to protect an important public interest. These offences do not carry the same moral connotation and have long been regarded as different from traditional offences.<sup>222</sup>

Under the CADP, individuals who have committed an ADRV are handed a provisional suspension prior to their anti-doping hearing; the hearing only considers the degree of fault in terms how it affects the sanction, not how it relates to whether or not the individual actually intended to commit an anti-doping rule violation. The burden of proof that individuals fighting an ADRV have to meet is balance of probabilities.<sup>223</sup> That standard, the civil standard, has been accepted by the Supreme Court as constitutional for regulatory offences where the accused has to show on a balance of probabilities that they either did their due diligence or were not negligent.<sup>224</sup>

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<sup>219</sup> *Ibid.*

<sup>220</sup> E.g., see Sharpe & Roach, *supra* note 63 at 330-33, citing *R v Whyte*, [1988] 2 SCR 3, 51 DLR (4th) 481; *R v Keegstra*, [1990] 3 SCR 697, 117 NR 1 [*Keegstra*]; *Wholesale Travel*, *supra* note 207.

<sup>221</sup> Sharpe & Roach, *ibid.*, at 332-33, citing *Oakes*, *supra* note 14, *R v St Onge-Lamoureaux*, 2012 SCC 57, [2012] 3 SCR 187.

<sup>222</sup> Sharpe & Roach, *ibid.*, at 298.

<sup>223</sup> CADP, *supra* note 23 at 3.1.

<sup>224</sup> Sharpe & Roach, *supra* note 63 at 332. Note the other standard, raising a reasonable doubt is lower, and acceptable in criminal law cases, *Keegstra*, *supra* note 220, is one case where the Supreme Court held that having to discharge the reverse onus on a balance of probabilities was constitutional for a criminal offence.

Doping is classified as a strict liability offence in the CADP,<sup>225</sup> but in some ways, doping functions as an absolute liability offence because the CADP does not permit individuals to avoid an ADRV; it only permits their sanctions to be reduced. Even if they manage to prove (on a balance of probabilities) that they did not intend to dope, their anti-doping rule violation is not avoided. At best, the sanction is reduced to the length of the provisional sanction served prior to the Doping Tribunal hearing, rather than months or years.<sup>226</sup> Based on how strict liability in the CADP operates in practice, it seems to breach s 11(d) because even if athletes can prove no fault or negligence, they are still sanctioned. The question then becomes whether or not that infringement of s 11(d) is demonstrably justifiable.

#### b. Section 1 Analysis for Section 11(d) the Presumption of Innocence

Rules 2.1 and 2.2 of the CADP impose strict liability. The pressing and substantial objective behind strict liability in anti-doping has been articulated as “not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors.”<sup>227</sup> The strict liability of the WADC has also been challenged—and upheld—at the CAS and the ECtHR based on reasons such as athletes who have performance enhancing drugs in their system benefit from those substances

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<sup>225</sup> CADP, *supra* note 23 at Comment to Rule 2.1.1.

<sup>226</sup> E.g., *Ibid* at 10.4, 10.5, 10.6 allow for periods of ineligibility to be reduced on the basis of no fault or negligence or no significant fault of negligence.

<sup>227</sup> CAS 94/129 *Quigley v Int'l Shooting Union* (1995) Court of Arbitration for Sport (Arbitrators Jan Paulsson, Denis Oswald, Luc Argand) at para 195, cited in James Nafziger, “The Principle of Fairness in the *Lex Sportiva* of CAS Awards and Beyond” in Robert Siekmann & Janwillem Soek, eds, *Lex Sportiva: What Is Sports Law?* (The Hague: Asser, 2012) 251 at 264. See also Kaufman-Kohler, *supra* note 25 at para 92.

regardless of their intention<sup>228</sup> and the difficulty of proving intent and/or performance enhancement.<sup>229</sup>

There is a rational connection between strict liability and its purpose. The CADP is concerned with eliminating doping in sports, that is, ensuring the playing field is not unnaturally unlevelled by the use of performance-enhancing drugs, regardless of whether or not their use was intentional. Imposing strict liability helps to ensure that non-doped athletes are not disadvantaged by others who have the benefit of a performance-enhancing substance in their bodies, and thus attempts to balance the rights of eligible athletes against the rights of athletes who have committed an ADRV (whether intentional or not).

Goldsworthy argues that the rationale behind strict liability offences generally rests on four grounds: deterrence, judicial economy, small penalties without social stigma, and parliamentary intention to create strict liability.<sup>230</sup> If NADOs had to prove intention to dope, it would make the fight against doping significantly more challenging and time consuming.<sup>231</sup> Strict liability can also have a deterring effect if individuals know that their guilt or innocence is not up for debate; knowing that intention to dope can, at best, only reduce a sanction may not be worth the risk.

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<sup>228</sup> See e.g., James Nafziger, “Lex Sportiva” in Robert Siekmann & Janwillem Soek, eds, *Lex Sportiva: What Is Sports Law?* (The Hague: Asser, 2012) 53 at 63-66 for a review of CAS awards. See also Michael J Beloff, “Is There a *Lex Sportiva*” in Robert Siekmann, Janwillem Soek, eds, *Lex Sportiva: What Is Sports Law?* (The Hague: Asser, 2012) 69 at 85-87.

<sup>229</sup> Nafziger, *supra* note 227 at 264, quoting *Quigley*, *supra* note 227: “It is likely even that intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it is certain that a requirement of intent would involve costly litigation that may well cripple federations—particularly those run on modest budgets—in their fight against doping.”

<sup>230</sup> Goldsworthy, *supra* note 28 at 198.

<sup>231</sup> E.g., Soek, *supra* note 210 at 225-228.

A strict liability regime is, technically, minimally impairing because it does not impose absolute liability. Strict liability, as it applies in the CADP, may not seem to be minimally impairing because of the automatic provisional suspensions; however, there is a chance that the provisional suspension could be the extent of the sanction imposed. Further, and although this likely does not carry much persuasive weight, strict liability as it currently operates in the CADP and WADC, is less impairing than earlier editions of the CADP and WADC.<sup>232</sup>

The proportionality of a strict liability regime is hard to assess without understanding why strict liability was the chosen standard. This relates back to the pressing and substantial objective behind employing strict liability. The harms of this regime are obvious: individuals do not have the chance to argue their case before they are sanctioned, and the degree of fault only applies toward the length of the sanction. The benefits of strict liability are that it makes anti-doping easier to enforce, and may be a greater deterrent. Even though not doping does not guarantee against strict liability, strict liability has benefits for eligible athletes because it means these athletes can be more confident that the playing field has not be artificially unlevelled through doping, and once sanctions are applied, their results are upgraded accordingly.<sup>233</sup>

While strict liability is problematic in that individuals are sanctioned regardless of fault or intention, it is not unjustified in light of the ends it seeks to achieve. A lack of better alternatives to strict liability may also indicate that this regime is the best of the

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<sup>232</sup> E.g., Kaufmann-Kohler, *supra* note 25 at paras 94-97.

<sup>233</sup> E.g., Beckie Scott, Dylan Armstrong, and Christine Girard are three Canadian Olympians who have received their Olympic medals retroactively. See Paula Nichols & Chloe Morrison, "History of Team Canada Olympic Medal Upgrades" (1 December 2018), online: *Olympic.ca*, <[olympic.ca/2018/12/01/history-of-team-canada-olympic-medal-upgrades/](http://olympic.ca/2018/12/01/history-of-team-canada-olympic-medal-upgrades/)>.

worst if the alternatives are absolute liability or protracted dispute resolution that turns anti-doping claims from disputes that are resolved relatively quickly into years-long saga (which could have the same effect on an athlete’s career in terms of loss of income and loss of opportunities to compete, as well as further delaying other athletes getting their results upgraded to the position they rightfully earned, and the other benefits like funding and sponsorship that flow from better results).

#### c. 11(d) Right to a Fair and Public Hearing

Section 11(d) also guarantees protection for the right to a fair and public hearing. Anti-doping hearings are not open to the public in Canada.<sup>234</sup> The denial of a public hearing was challenged at the European Court of Human Rights (ECtHR) by German speed-skater, Claudia Pechstein. Although Pechstein ultimately lost her anti-doping case,<sup>235</sup> she did win a point in that the ECtHR noted the CAS should have ceded to Pechstein’s request for a public hearing. The CAS has since made changes to its procedures to allow public hearings.<sup>236</sup>

The denial of a public hearing is not built into the CADP, but rather the SDRCC Procedural Code.<sup>237</sup> There is no stated requirement in the CADP code that anti-doping hearings must be held in private, so it is not the CADP that violates the s 11(d) right to a

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<sup>234</sup> SDRCC Code, *supra* note 133 at 6.3.

<sup>235</sup> Pechstein challenged an anti-doping rule violation that was asserted as a result of ABP irregularities—one of the first ADRVs arising from the ABP. She lost her case at the CAS, appealed to the Swiss federal court and lost there, before going through all three levels of court in Germany, where although initially successful, lost at the higher courts. She finally appealed to the European Court of Human Rights, which ruled in favour of the CAS.

<sup>236</sup> See Court of Arbitration for Sport, Media Release, “The European Court of Human Rights (ECHR) Rejects the Request of Claudia Pechstein to Refer Her Case to the Grand Chamber of the ECHR” (5 February 2019), online: *CAS*, <[www.tas-cas.org/fileadmin/user\\_upload/Media\\_Release\\_Pechstein\\_ECHR\\_GC.pdf](http://www.tas-cas.org/fileadmin/user_upload/Media_Release_Pechstein_ECHR_GC.pdf)>; *CAS, Code of Sports Related Arbitration* (in force as of 1 January 2019) at R44.2, R57, online: *CAS* <[www.tas-cas.org/fileadmin/user\\_upload/Code\\_2019\\_\\_en\\_.pdf](http://www.tas-cas.org/fileadmin/user_upload/Code_2019__en_.pdf)> [CAS Code].

<sup>237</sup> SDRCC Code, *supra* note 133 at 6.3.

fair and public hearing, but rather the SDRCC.<sup>238</sup> In order to have a public anti-doping hearing, someone would thus have to challenge the SDRCC and argue its procedural code violates s 11(d). That said, the SDRCC is modelled after the CAS,<sup>239</sup> and the SDRCC has jurisdiction to set its own procedures.<sup>240</sup> That jurisdiction may indicate that the SDRCC will follow the lead of the CAS and amend its procedural code in order to permit public anti-doping hearings.

## 8. Section 15: Equality Rights

Section 15 of the *Charter* protects against discrimination on the grounds enumerated in s 15(1), and grounds analogous to those listed. These are “race, national or ethnic origin, colour, religion, sex, age or mental or physical disability;<sup>241</sup> analogous grounds that the Supreme Court has identified include sexual orientation,<sup>242</sup> non-citizenship,<sup>243</sup> residency,<sup>244</sup> and marital status.<sup>245</sup> In order for claimants to prove s 15 has been violated, claimants first need to show that the law creates a distinction based on enumerated or analogous grounds. Once that has been established, the claimant must then prove that the distinction is discriminatory because it perpetuates a pre-existing stereotype,

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<sup>238</sup> Other sport dispute resolution bodies, including the CAS and Sport Resolutions, the United Kingdom’s national sport dispute resolution body, both allow for public hearings on request. See Sport Resolutions UK, *Arbitration Rules of Sport Resolutions* (August 2018) at 14.9, 9.2, online: *Sport Resolutions*, <[www.sportresolutions.co.uk/uploads/related-documents/D\\_3\\_-\\_Arbitration\\_Rules.pdf](http://www.sportresolutions.co.uk/uploads/related-documents/D_3_-_Arbitration_Rules.pdf)>. See also CAS Code, *supra* note 236 at R44.2, R57.

<sup>239</sup> Report of the Work Group to the Secretary of State (Amateur Sport), *A Win-Win Solution: Creating a National Alternate Dispute Resolution System for Amateur Sport in Canada* (May 2000) at 2, online: *SDRCC*, <[www.crdsc-sdrcc.ca/eng/documents/Working-Group-Report-e.pdf](http://www.crdsc-sdrcc.ca/eng/documents/Working-Group-Report-e.pdf)>.

<sup>240</sup> *Physical Activity and Sport Act*, SC 2003, c 2, s 17(1)(a)(i).

<sup>241</sup> *Charter*, *supra* note 13 at s 15(1).

<sup>242</sup> *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609.

<sup>243</sup> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1.

<sup>244</sup> *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 163 FTR 284.

<sup>245</sup> *Miron v Trudel*, [1995] 2 SCR 418, 23 OR (3d) 160.

disadvantage, or prejudice, the law fails to take into account the actual needs of those it discriminates against, or its intended ameliorated effect fails.<sup>246</sup>

Defendants can attempt to use s 15(2) as a defence against s 15(1) claims by demonstrating that the distinction is not discriminatory because has a genuinely ameliorative or remedial purpose, and it targets a disadvantaged group (based on enumerated or analogous grounds).<sup>247</sup> For example, in *Kapp*, the federal government was able to refute Kapp's s 15(1) claim on the basis that the Aboriginal Fishing Strategy had a genuinely ameliorative purpose (to enhance Indigenous involvement in the commercial fishery) and targeted a historically disadvantaged group (Indigenous peoples). Kapp argued that the program discriminated against him on the basis of race because it allowed Indigenous fishers to start their fishing season 24 hours before other commercial fishers.

The CADP has been challenged—unsuccessfully—on the basis of discrimination. Jeffrey Adams, in his cases related to his 2006 anti-doping violation, argued that the CADP and the WADC violated his *Charter* rights and discriminated on the basis of disability because, under the CADP in place at the time, the CCES was not required to provide sterile catheters to athletes requiring them.<sup>248</sup> Adams is a para-athlete and requires a catheter to use the bathroom. He argued not offering him a catheter was discriminatory because disabled athletes were distinguished in a discriminatory manner from non-disabled athletes in that they were not automatically provided with sterile

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<sup>246</sup> *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*].

<sup>247</sup> *Ibid.*

<sup>248</sup> SDRCC DT-06-0039 *Canadian Centre for Ethics in Sport v Jeffrey Adams*, (2006) Sport Dispute Resolution Centre of Canada (Arbitrator Richard McLaren), online: SDRCC, <[www.crdsc-sdrcc.ca/resource\\_centre/pdf/English/507\\_SDRCC\\_DT-06-0039.pdf](http://www.crdsc-sdrcc.ca/resource_centre/pdf/English/507_SDRCC_DT-06-0039.pdf)> [*Adams 2006*]; CAS 2007/A/1312 *Jeffrey Adams v Canadian Centre for Ethics in Sport*, (2007) Court of Arbitration for Sport (Arbitrators Mark Baker, Edward Ratushny, Graeme Mew), online: CAS, <[jurisprudence.tas-cas.org/Shared%20Documents/1312.pdf](http://jurisprudence.tas-cas.org/Shared%20Documents/1312.pdf)> [*Adams 2007*]; *Adams v Canada*, 2011 ONSC 325, 272 OAC 301 [*Adams 2011*].

equipment. Both the SDRCC and the CAS found that the *Charter* did not apply, but the Ontario *Human Rights Act* did.<sup>249</sup> Both tribunals concluded that Adams had not been discriminated against because the CADP permits athletes requiring catheters to request one from doping control; had Adams requested and been denied a catheter by doping control, it would have amounted to discrimination, but since doping control has no obligation to offer sterile catheters to athletes, Adams was not discriminated against based on disability.<sup>250</sup> In 2018, Adams again attempted to challenge the CADP on the basis it discriminates based on disability.<sup>251</sup> This case was dismissed on the basis it was speculative.

In *Adams 2006*, the arbitrator noted that the CCES allows modifications for doping control procedures for athletes with a disability under Annex B of the International Standards for Testing and Investigations.<sup>252</sup> Annex B would likely foil a s 15(1) *Charter* claim because it has a genuinely ameliorative purpose: to ensure the needs of athletes with impairments are met without compromising the integrity of doping control.<sup>253</sup> The program targets people with disabilities. The CCES has modified Annex 6B of the ISTI to make it more accommodating of people with disabilities in that the

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<sup>249</sup> *Adams 2006*, *supra* note 248 at paras 150-164, 165-175; *Adams 2007*, *supra* note 248 at 9-11, 12.

<sup>250</sup> *Adams 2006*, *ibid*, at paras 165-175, *Adams 2007*, *ibid*, at 13.

<sup>251</sup> *Adams 2018*, *supra* note 134. This case was strictly a human rights case. He again argued that not automatically providing catheters to disabled athletes was discriminatory; however, under the CADP disabled athletes may request a sterile catheter and are offered a selection of three different ones from which to choose.

<sup>252</sup> *Adams 2006*, *supra* note 248 at para 128. This practice has not changed. See Canadian Centre for Ethics in Sport, "Accessibility" (last visited 11 September 2019), online: CCES, <[www.cces.ca/accessibility](http://www.cces.ca/accessibility)>: "The CCES will provide a catheter if the athlete chooses to use one provided by the CCES." Note: in the decision and on the CCES website, the annex is referred to as Annex 6B. It is now titled Annex B, which is how it is referred to here.

<sup>253</sup> WADA ISTI, *supra* note 77 at B.1 [Annex B].



CCES provides a choice of catheters and allows sample collection procedures to be modified to accommodate impairments or disabilities.<sup>254</sup>

Another way the CADP could arguably violate s 15 is discrimination based on sex or disability is with respect to the Prohibited List and gaining therapeutic use exemptions (TUEs). For example, trans-athletes (particularly male-to-female trans athletes) would need to apply for a TUE in order to take testosterone; they could argue that requiring a TUE for necessary hormones discriminates based on sex. Similarly, athletes who may rely on substances on the Prohibited List for medical reasons could also argue that the Prohibited List discriminates based on disability by requiring them to obtain a TUE to take a medically necessary prohibited substance. Although both of these examples may seem discriminatory, they are not.

While the process of obtaining an TUE can be extremely tedious and time-consuming, it is not discriminatory. Therapeutic use exemptions are intended to mitigate against possible discrimination based on grounds such as illness or disability.<sup>255</sup> The TUE process is based on what is on the Prohibited List;<sup>256</sup> because it is also based on the unique circumstances of each athlete who applies for a TUE, doing an analysis of whether or not the inclusion or exclusion of certain products on the prohibited list is discriminatory is beyond the scope of this thesis. Regardless, a claim arguing the TUE process discriminates would also be foiled by s 15(2) of the *Charter*. TUEs are granted according to the International Standard for Therapeutic Use Exemptions (ISTUE).<sup>257</sup> The

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<sup>254</sup> *Ibid* at B.4.3.

<sup>255</sup> E.g., a lot of asthma medications are prohibited, but athletes can get a TUE for puffers/inhalers, etc., so that avoids discriminating on the basis of asthma, whether it be considered a disability or an illness.

<sup>256</sup> Prohibited List, *supra* note 96.

<sup>257</sup> World Anti-Doping Agency, *World Anti-Doping Code International Standard: Therapeutic Use Exemptions* (Montreal: WADA, January 2019), online: *WADA* <[www.wada-ama.org/sites/default/files/resources/files/istue\\_2019\\_en\\_new.pdf](http://www.wada-ama.org/sites/default/files/resources/files/istue_2019_en_new.pdf)> [ISTUE].

objective behind granting TUEs is to ensure athletes requiring a prohibited substance (or method) for medical reasons are able to do so.<sup>258</sup> The TUE program is a program that accommodates where the Prohibited List otherwise discriminates.

### Section 1 Analysis for s 15 Infringements

The above discussion casts doubt on whether or not s 15 of the *Charter* is violated by the CADP. The CADP, through Annex B of the ISTI, accommodates and can modify testing procedures for athletes with disabilities. Its objective is, “To ensure that the particular needs of Athletes with impairments are considered in relation to the provision of a Sample, where possible, without compromising the integrity of the Sample Collection Session.”<sup>259</sup> Similarly, although it is unlikely that the TUE process would succeed on a s15(1) claim, it likely would be considered a demonstrably justifiable limit of *Charter* rights under s 1. The objective of TUEs is to enable athletes to use medically necessary substances or methods on the Prohibited List without getting penalized by an anti-doping rule violation.

Even if s 15(1) was violated, the objective of Annex B is sufficient to meet the pressing and substantial objective, and the rational connection requirements of the *Oakes* test because it aims to accommodate athletes with disabilities and uphold the integrity of anti-doping processes, as does the TUE process. Annex B and TUE requirements are also minimally impairing because, for example, the CCES allows athletes to have a choice of three catheters if they request a catheter or do not have one of their own. The TUE process, likewise, allows athletes to use otherwise prohibited substances or methods. The

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<sup>258</sup> *Ibid* at 1.0 & 4.1.

<sup>259</sup> WADA ISTI, *supra* note 253 at B.1 (non-standard capitalization in the original).

CADP, if it was found to discriminate based on disability, would be saved under s 1 of the *Charter* as being a demonstrably justifiable limit.

## 9. Conclusion

There are many ways that the CADP, at first glance, seems to risk violating *Charter* rights like freedom of association; life, liberty, and security of the person; freedom from unreasonable search or seizure; the presumption of innocence; a fair and public hearing; and freedom from discrimination. However, based on detailed analysis, it can be concluded that these infringements do not amount to violations of *Charter* rights and freedoms that cannot be demonstrably justified under s 1 of the *Charter*.

Ineligibility and prohibited association do not violate s 2(d), but even if those provisions did infringe s 2(d), they would be saved under s 1 of the *Charter* because they are minimally impairing. Likewise, the Whereabouts Rule, out-of-competition testing, the Prohibited List, provisional and mandatory minimum sanctions do not infringe the rights guaranteed by s 7's protection of liberty and security of the person interests; these provisions certainly do not infringe s 7 in a manner that does not accord with principles of fundamental justice. Similarly, the CADP does not suffer from vagueness, arbitrariness, or overbreadth, even if the standard of proof required, comfortable satisfaction, is not a typical civil or criminal burden of proof. Although drug testing intrudes on personal privacy, it does not breach s 8 because it does not constitute an unreasonable search or seizure. The CADP is a strict liability regime, and may seem to violate the presumption of innocence protected by s 11(d); however, strict liability as it functions in the CADP would be saved under s 1 because it is minimally impairing. Finally, the CADP does not violate s 15 because it is not discriminatory. There are

options available, like requesting catheters or obtaining TUEs that ensure people who need accommodation based on disability or other grounds are not discriminated against.

Although the CADP is *Charter* complaint, that does not mean it cannot be improved, particularly with respect to procedural issues imposed by the SDRCC; that is consenting to the jurisdiction of the SDRCC without notice, and waiving the right to a fair and public hearing without notice.

# Chapter 5: Conclusion

These final paragraphs may be anticlimactic in that if the *Charter* applies to the Canadian Anti-Doping Program,<sup>1</sup> it does not result in any major overhauls to the regime to redress *Charter* infringements. However, this thesis matters because it provides a robust analysis of whether or not the *Charter* applies to the CCES and/or the CADP. It sheds light on why some provisions of the CADP exist in their current form and what their underlying objectives are, and provides a basis upon which Canadians can have confidence that our anti-doping program is *Charter* compliant.

The CADP involves multiple players in the Canadian and international sport system: the Canadian Centre for Ethics in Sport as its administrator, the Sport Dispute Resolution Centre of Canada as the designated adjudicator of anti-doping disputes, the Court of Arbitration for Sport as the adjudicator of international anti-doping disputes, the federal government, and of course, sport participants in the form of athletes, coaches, officials, volunteers, athlete support personnel, and others. National and provincial sport organizations require individuals to consent to abide by the CADP as a condition of membership. Anti-doping demonstrates one of the ways sport is used as a policy tool: to promote ethical behaviour in Canadians, and to demonstrate at the international level that Canada, through the CADP, produces high calibre athletes who compete ethically in the highest echelons of sport—which reflects well on Canada as a whole.

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<sup>1</sup> Canadian Centre for Ethics in Sport, *2015 Canadian Anti-Doping Program* (1 September 2017), online: CCES, <[cces.ca/sites/default/files/content/docs/pdf/cces-policy-cadp-2015-v2-e.pdf](http://cces.ca/sites/default/files/content/docs/pdf/cces-policy-cadp-2015-v2-e.pdf)>.

The CADP represents Canada's efforts at combatting doping in sport in accordance with the World Anti-Doping Code.<sup>2</sup> It is how Canada meets its commitments under the UNESCO Convention Against Doping in Sport,<sup>3</sup> and it is how the CCES upholds its commitments as Canada's national anti-doping organization and as a signatory of the WADC. The CADP is a continuation of Canada's historic and ongoing leadership in anti-doping, and complying with the CADP is a requirement of gaining funding from Sport Canada programs like the Sport Support Program or the Athlete Assistance Program. Although the CADP is administered and authored by an independent not-for-profit corporation, the CCES, the CADP constitutes a government action because of its integration into several government policies and programs. As such, it is subject to the *Charter*. The CCES, as a private not-for-profit corporation, arguably, is not subject to the *Charter* because it does not meet the requisite criteria to be considered a government actor based on the *McKinney* control test.<sup>4</sup>

Athletes' rights, like privacy, freedom of association, security of the person, liberty, freedom from discrimination, and the presumption of innocence all seem to suffer some impairment under the CADP through provisions like the Whereabouts Rule, the rule against prohibited association, or the strict liability of doping offences to name a few. However, none of these potential violations breaches the threshold of a *Charter* violation that cannot be demonstrably justified in a free and democratic society, or does not accord with principles of fundamental justice. The CADP is *Charter* complaint when

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<sup>2</sup> World Anti-Doping Agency, *World Anti-Doping Code 2015* (with 2018 Amendments) (Montreal: WADA, 2018).

<sup>3</sup> UNESCO, *International Convention Against Doping in Sport* 2005, 19 October 2005, 2419 UNTS 201 (entered into force 1 February 2007).

<sup>4</sup> *McKinney v University of Guelph*, [1990] 3 SCR 229, 2 OR (3d) 319.

considering the ends used to achieve the means with respect to the objectives behind anti-doping—protecting the spirit of sport and the health of athletes. It is an integral part of Canadian sport and serves to protect both the interests and integrity of sport, and the interests and integrity of athletes.

# Bibliography

## Legislation & Conventions

*An Act Respecting the Immunities Granted to the World Anti-Doping Agency*, SQ 2018, c 33.

*Arbitration Act, 1991*, SO 1991 c 17, s 46(1)(5).

*Canada Corporations Act*, RSC 1970, c C-32.

*Canada Not-for-Profit Corporations Act*, SC 2009, c 23.

*Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

*Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11.

Council of Europe & European Court of Human Rights, *European Convention on Human Rights* (in force since 1 June 2010).

*Federal Courts Act*, RSC 1985, c F-7.

*Hospital Insurance Act*, RSBC 1996, c 204.

*Inquiries Act*, RSC 1985, c I-11.

*Physical Activity and Sport Act*, SC 2003, c 2.

*Post-Secondary Learning Act*, SA 2003, c P-19.5.

UNESCO, *International Convention Against Doping in Sport 2005*, 19 October 2005, 2419 UNTS 201 (entered into force 1 February 2007).

*United Nations Declaration of the Rights of Indigenous Peoples*, UNGA Res 61/295, UNGA, 61st Sess, UN Doc A/RES/61/295 (2007).

*Vienna Convention on the Law of Treaties*, 23 May 1969, 1155, I18232 UNTS 331 (entered into force 27 January 1980).

## Jurisprudence

*AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 SCR 181.

*Adams v Canada*, 2011 ONSC 325, 272 OAC 301.



*Adams v Ontario Cycling Association*, 2018 HRTO 548.

*Air Canada v Toronto Port Authority*, 2011 FCA 347, [2013] 3 FCR 605.

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

*Aquatech v Alberta (Minister of Environment)*, 2019 ABQB 62.

BCLRB No. B2/2019 *Canadian Rugby Union (Federation Canadienne De Rugby) v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-1937*, 2019 CanLII 878 (BC LRB), <<http://canlii.ca/t/hwz6q>>.

*Beaucage v Métis Nation of Ontario*, 2019 ONSC 633, 2019 CarswellOnt359.

*Bell v Civil Air Search and Rescue Association et al*, 2018 MBCA 96, [2018] 12 WWR 114.

*Black v Law Society of Alberta*, [1989] 1 SCR 591, 58 DLR (4th) 317.

*Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, 190 DLR (4th) 513.

*Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101.

*Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134.

*Canadian Centre for Ethics in Sport v Russell* [2007], OJ No 2234, 158 ACWS (3d) 692 (Ont SC).

*Canadian Egg Marketing Agency v Richardson*, [1998] 3 SCR 157, 166 DLR (4th) 1.

*Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, [2004] 1 SCR 76.

*Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331.

CAS 2002/A/399 *Federation Internationale de Natation Award (FINA) of 31 January 2003*, (2003) Court of Arbitration for Sport (Arbitrators Martin Schimke, Richard McLaren, Denis Oswald), online: CAS, <[jurisprudence.tas-cas.org/Shared%20Documents/399.pdf#search=%22disciplinary%20sanctions%20in%20doping%20cases%20are%20similar%20to%20penalties%20in%20criminal%20proceedings%22](http://jurisprudence.tas-cas.org/Shared%20Documents/399.pdf#search=%22disciplinary%20sanctions%20in%20doping%20cases%20are%20similar%20to%20penalties%20in%20criminal%20proceedings%22)>.

CAS 2002/A/432D *Federation Internationale de Natation (FINA) Award of 27 May 2003*, (2003) Court of Arbitration for Sport (Arbitrators John Faylor, Pantelis Dedes, Denis Oswald), online: CAS, <[jurisprudence.tas-cas.org/Shared%20Documents/432.pdf#search=%22disciplinary%20sanctions%20in%20doping%20cases%20are%20similar%20to%20penalties%20in%20criminal%20proceedings%22](http://jurisprudence.tas-cas.org/Shared%20Documents/432.pdf#search=%22disciplinary%20sanctions%20in%20doping%20cases%20are%20similar%20to%20penalties%20in%20criminal%20proceedings%22)>.

0in%20doping%20cases%20are%20similar%20to%20penalties%20in%20crimina  
l%20proceedings%22>.

CAS 2007/A/1312 *Jeffrey Adams v Canadian Centre for Ethics in Sport*, (2007) Court of Arbitration for Sport (Arbitrators Mark Baker, Edward Ratushny, Graeme Mew), online: CAS, <jurisprudence.tas-cas.org/Shared%20Documents/1312.pdf>.

CAS 98/222 B. *International Triathlon Union (ITU) Award of 9 August 1999*, (1999) Court of Arbitration for Sport (Arbitrators Mirko Ilesic, Christian Krähe, Olivier Carrard), online: CAS, <jurisprudence.tas-cas.org/Shared%20Documents/222.pdf>.

*Catholic Children's Aid Society of Metropolitan Toronto v S(T)* (1989), 69 OR (2d) 189, 60 DLR (4th) 397 (ON CA).

*Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350.

*Cheskes v Ontario (Attorney General)* (2007), 87 OR (3d) 581, 288 DLR (4th) 449 (Ont Sup Ct).

*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd*, 2013 SCC 34, [2013] 2 SCR 458.

*Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 163 FTR 284.

*Deacon v Canada (Attorney General)*, 2006 FCA 265, 352 NR 380.

*Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395.

*Dorey v Demone*, 3 RFL Rep 124, 6 DLR (2d) 296.

*Douglas/Kwantlen Faculty Assn v Douglas College*, [1990] 3 SCR 570, 118 NR 340.

*Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609.

*Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577.

*Entrop v Imperial Oil*, 50 OR (3d) 18, 189 DLR (4th) 14 (ON CA).

*Fédération Nationale des Syndicats Sportifs (FNASS) and Others v France* (application no 48151/11 & 77769/13) [2018], ECLI:CE:ECHR:2018:0118JUD004815111, online: ECtHR, <hudoc.echr.coe.int/eng?i=001-180442>.

*Godbout v Longueuil (City)*, [1997] 3 SCR 844, 152 DLR (4th) 577.

*Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 SCR 250.

*Gray v Can Track and Field Assn* [1986], 39 ACWS (2d) 483, 1986 CarswellOnt 2878 (Ont HCJ).

*Greater Vancouver Transit Authority v Canadian Federation of Students—British Columbia Component*, 2009 SCC 31, [2009] 2 SCR 295.

*Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR.

*Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v Wall*, 2018 SCC 26, [2018] 1 SCR 750.

*Hunter et al v Southam Inc*, [1984] 2 SCR 145, 11 DLR (4th) 641.

*In the Matter of Glen Dodds and the Sport Medicine Council of Canada*, (21 May 1987), unreported decision of an independent arbitrator, (Arbitrator: RJ Delisle).

*Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577.

*Jamieson v Whistler Mountain Resort Limited Partnership*, 2017 BCSC 1001, 2017 BCSC 1001 (CanLII).

*Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 SCR 386.

*Lavallee, Rackel & Heintz v Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General); R v Fink*, 2002 SCC 61, [2002] 3 SCR 209.

*Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211, 3 OR (3d) 511.

*Libman v Quebec (AG)*, [1997] 3 SCR 569, 151 DLR (4th) 385.

*Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, [2000] 2 SCR 1120, 193 DLR (4th) 193.

*Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 SCR 613.

*McKinney v University of Guelph*, [1990] 3 SCR 229, 2 OR (3d) 319.

*Miron v Trudel*, [1995] 2 SCR 418, 23 OR (3d) 160.

*Mounted Police Association of Ontario v Canada (AG)*, 2015 SCC 1, [2015] 1 SCR 3.

*New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46, 216 NBR (2d) 25.

*Pridgen v University of Calgary*, 2012 ABCA 139, 350 DLR (4th) 1.

*Quewezance v Federation of Sovereign Indigenous Nations*, 2018 SKQB 313, 300 ACWS (3d) 452.

*R v Borden*, [1994] 3 SCR 145, 119 DLR (4th) 74.

*R v Caslake*, [1998] 1 SCR 51, 155 DLR (4th) 19.

*R v Collins*, [1987] 1 SCR 265, 38 DLR (4th) 508.

*R v DB*, 2008 SCC 25, [2008] 2 SCR 3.

*R v Dymont*, [1988] 2 SCR 417, 55 DLR (4th) 503.

*R v Ellis-Don*, [1992] 1 SCR 840, 7 OR (3d) 320.

*R v Evans*, [1996] 1 SCR 8, 131 DLR (4th) 654.

*R v Heywood*, [1994] 3 SCR 761, 120 DLR (4th) 348.

*R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483.

*R v Lloyd*, 2016 SCC 13, [2016] 1 SCR 130.

*R v Malmo-Levine; R. v. Caine*, 2003 SCC 74, [2003] 3 SCR 571.

*R v Martin*, [1992] 1 SCR 838, 7 OR (3d) 19.

*R v Morales*, [1992] 3 SCR 711, 77 CCC (3d) 91.

*R v Morgentaler*, [1988] 1 SCR 30, 63 OR (2d) 281.

*R v Moriarty*, 2015 SCC 55, [2015] 3 SCR 485.

*R v Nur*, 2015 SCC 15, [2015] 1 SCR 773.

*R v O'Connor*, [1995] 4 SCR 411, 130 DLR (4th) 235.

*R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 71.

*R v Skinner*, [1990] 1 SCR 1235, 109 NR 241.

*R v Stillman*, [1997] 1 SCR 607, 185 NBR (2d) 1.

*R v Suter*, 2018 SCC 34, [2018] 2 SCR 496.

*R v Tessling*, 2004 SCC 67, [2004] 3 SCR 432.

*R v Vu*, 2003 SCC 6, [2013] 3 SCR 657.

*R v Wholesale Travel Group Inc*, [1991] 3 SCR 154, 4 OR (3d) 700.

*R v Wills*, 7 OR (3d) 337, 52 OAC 321 (ON CA).

*R v Wong*, [2008] OJ No 51, 87 WCB (2d) 838.

*R v Orbanski; R. v. Elias*, [2005] 2 SCR 3, 2005 SCC 37.

*Re: BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536.

*Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313, 38 DLR (4th) 161.

*Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123, 109 NR 81.

*Ruby v Canada*, 2002 SCC 75, [2002] 4 SCR 3.

*RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 33 DLR (4th) 174.

*Sagen v Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, 2009 BCCA 522, 98 BCLR (4th) 141 (CanLII).

*Sagen v Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, 2009 BCSC 942, 98 BCLR (4th) 109 (CanLII).

*Sagen v Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, 2009 BCSC 942, (Plaintiffs' Memorandum of Argument).

*Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245.

SDRCC DT-06-0039 *Canadian Centre for Ethics in Sport v Jeffrey Adams*, (2006) Sport Dispute Resolution Centre of Canada (Arbitrator Richard McLaren), online: *SDRCC*, <[www.crdsc-sdrcc.ca/resource\\_centre/pdf/English/507\\_SDRCC\\_DT-06-0039.pdf](http://www.crdsc-sdrcc.ca/resource_centre/pdf/English/507_SDRCC_DT-06-0039.pdf)>.

SDRCC DT-18-0294 *Canadian Centre for Ethics in Sport v Greg Doucette*, (2018) Sport Dispute Resolution Centre of Canada (Arbitrator Allan Stitt), online: *SDRCC*, <[www.crdsc-sdrcc.ca/resource\\_centre/pdf/English/879\\_SDRCC%20DT%2018-0294.pdf](http://www.crdsc-sdrcc.ca/resource_centre/pdf/English/879_SDRCC%20DT%2018-0294.pdf)>.

*Simon Gillies et al v Toronto District School Board*, 2015 ONSC 1038, 125 OR (3d) 17.

*Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416.

*Starson v Swayze*, 2003 SCC 32, [2003] 1 SCR 722.

*Stewart v Elk Valley Coal Corp*, 2017 SCC 30, [2017] 1 SCR 591.

*Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483, 76 DLR (4th) 700.

*Strauss v British Columbia (Minister of Public Safety)*, 2018 BCSC 1414, 2018 CarswellBC 2229.

*Sveshinikov v World Anti-Doping Agency*, 2018 ONSC 7245, 2018 CarswellOnt 20658.

*Weber v Ontario Hydro*, [1995] 2 SCR 929, 24 OR (3d) 358.

*West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 SCR 635.

*West Toronto United Football Club v Ontario Soccer Association*, 2014 ONSC 5881, 327 OAC 29.

*X (Re)*, 2003 CanLII 54895 (ON CCB), 2003 CarswellOnt 8230.

### **Primary Sources: Government Documents, Reports, Policies, etc.**

Bennett, Carolyn, "Speech Delivered at the United Nations Permanent Forum on Indigenous Issues, New York, May 10" (delivered at the UN Permanent Forum on Indigenous Issues, New York City, 10 May 2016), online: *Canada*, <[www.canada.ca/en/indigenous-northern-affairs/news/2016/05/speech-delivered-at-the-united-nations-permanent-forum-on-indigenous-issues-new-york-may-10.html](http://www.canada.ca/en/indigenous-northern-affairs/news/2016/05/speech-delivered-at-the-united-nations-permanent-forum-on-indigenous-issues-new-york-may-10.html)>.

Canadian Heritage, *Sport Canada Athlete Assistance Program Policies and Procedures*. (Ottawa: Public Works and Government Services Canada, 2015).

Dubin, Charles, *Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance*, (final report of commission), Commissioner Charles Dubin (Ottawa: Minister of Supply and Services Canada, 1990).

Government of Canada, *2019 Canadian High Performance Sport Strategy* (Ottawa: Canadian Heritage, 2019).

———, *Actively Engaged: A Policy on Sport for Girls and Women* (last modified 31 October 2017), online: *Canada*, <[www.canada.ca/en/canadian-heritage/services/sport-policies-acts-regulations/policy-actively-engaged-women-girls.html](http://www.canada.ca/en/canadian-heritage/services/sport-policies-acts-regulations/policy-actively-engaged-women-girls.html)>.

———, "Application Guidelines: Sport Support Program" (Last modified 18 June 2019), online: *Canada*, <[www.canada.ca/en/canadian-heritage/services/funding/sport-support/national-organization/application-guidelines.html](http://www.canada.ca/en/canadian-heritage/services/funding/sport-support/national-organization/application-guidelines.html)>.

———, *Canadian Policy Against Doping in Sport—2011* (11 February 2011), online: *Canada*, <[www.canada.ca/en/canadian-heritage/services/sport-policies-acts-regulations/policy-against-doping-sport.html](http://www.canada.ca/en/canadian-heritage/services/sport-policies-acts-regulations/policy-against-doping-sport.html)>.

- , *Canadian Sport Policy 2012* (Ottawa: Canadian Heritage, 2012).
- , *Departmental Plan 2019–20—Canadian Heritage* (Ottawa: Canadian Heritage, 2019), online: *Canada*, <[www.canada.ca/en/canadian-heritage/corporate/publications/plans-reports/departmental-plan-2019-2020.html](http://www.canada.ca/en/canadian-heritage/corporate/publications/plans-reports/departmental-plan-2019-2020.html)>.
- , *Federal Policy for Hosting International Events* (Effective 1 January 2008, last modified 31 October 2017) (Ottawa: Government of Canada, 2008), online: *Canada*, <[www.canada.ca/en/canadian-heritage/services/sport-policies-acts-regulations/policy-hosting-international-sport-events.html](http://www.canada.ca/en/canadian-heritage/services/sport-policies-acts-regulations/policy-hosting-international-sport-events.html)>.
- , *Investing in Young Canadians: Budget 2019* (Ottawa: Department of Finance, 2019), online: *Canada*, <[www.budget.gc.ca/2019/docs/youth-jeunes/youth-jeunes-en.html](http://www.budget.gc.ca/2019/docs/youth-jeunes/youth-jeunes-en.html)>.
- , *Public Accounts of Canada, 2018* (6 November 2018), online: *Canada*, <[www.tpsgc-pwgsc.gc.ca/recgen/cpc-pac/2018/vol1/s11/oc-co-eng.html](http://www.tpsgc-pwgsc.gc.ca/recgen/cpc-pac/2018/vol1/s11/oc-co-eng.html)>.
- , *Report of the Task Force on Sport for Canadians* (Ottawa: Queen’s Printer, 1969).
- , “Sport Funding and Accountability Framework” (last modified 18 December 2018), online: *Canada*, <[www.canada.ca/en/canadian-heritage/services/funding/sport-support/accountability-framework.html](http://www.canada.ca/en/canadian-heritage/services/funding/sport-support/accountability-framework.html)>.
- , *The Canadian Sport Policy* (Ottawa: Canadian Heritage, 2002).
- , *Toward 2000: Building Canada’s Sport System* (Ottawa: Government of Canada, 1988).
- Holmes, Nancy, *Drug Testing: Legal Implications* (Ottawa: Library of Parliament, 1999).
- Holmes, Nancy & Karine Richer, *Drug Testing in the Workplace* (Ottawa: Library of Parliament, 2008).
- House of Commons Debates*, 33-2, Vol 5 (6 May 1987) (Otto Jelinek), online: *Canadian Parliamentary Historical Resources*, <[parl.canadiana.ca/view/oop.debates\\_HOC3302\\_05/511?r=0&s=1](http://parl.canadiana.ca/view/oop.debates_HOC3302_05/511?r=0&s=1)>.
- House of Commons Debates*, 39-2, No 90 (7 May 2008).
- House of Commons Debates*, 42-1, Vol 148, No 100 (28 October 2016) (Pam Goldsmith-Jones).
- House of Commons Debates*, 42-1, Vol 148, No 336 (17 October 2018) (Andrew Leslie).

- House of Commons, Legislative Committee on Bill C-85, *an Act Respecting the Control of Psychoactive Substances and their Precursors and to Amend the Criminal Code, the Food and Drugs Act and the Proceeds of Crime (Money Laundering) Act and Repeal the Narcotic Control Act in Consequence Thereof*, Evidence, 34-3, vol 1, no 1-6 (25 May 1993) (Victor Lachance & Lenora Kung, online: *Canadian Parliamentary Historical Resources*, <[parl.canadiana.ca/view/oop.com\\_HOC\\_3403\\_87\\_1/81?r=0&s=1](http://parl.canadiana.ca/view/oop.com_HOC_3403_87_1/81?r=0&s=1)>).
- House of Commons, *Minutes of Proceeding and Evidence of the Legislative Committee on Bill C-85: Legislative Committee on Bill C-85, An Act Respecting the Control of Psychoactive Substances and their Precursors and to Amend the Criminal Code, the Food and Drugs Act and the Proceeds of Crime (Money Laundering) Act and Repeal the Narcotic Control Act in Consequence Thereof*, 34-3, vol 1, no 1-6 (11 May 1993, 13 May 1993) (chair: Doug Fee), online: *Canadian Parliamentary Historical Resources*, <[parl.canadiana.ca/view/oop.com\\_HOC\\_3403\\_87\\_1/1?r=0&s=1](http://parl.canadiana.ca/view/oop.com_HOC_3403_87_1/1?r=0&s=1)>.
- House of Commons, Standing Committee on Canadian Heritage, Sub-Committee on the Study of Sport in Canada, *Sport in Canada: Everybody's Business; Leadership, Partnership and Accountability* (December 1998) (Chair: Dennis Mills), online: *Our Commons*, <[www.ourcommons.ca/DocumentViewer/en/36-1/CHER/report-6/page-2](http://www.ourcommons.ca/DocumentViewer/en/36-1/CHER/report-6/page-2)>.
- House of Commons, Standing Committee on Canadian Heritage, *Women and Girls in Sport: Report of the Standing Committee on Canadian Heritage* (September 2017) (chair: Hedy Fry).
- House of Commons, Standing Committee on Health and Welfare, Social Affairs, Seniors and the Status of Women. Evidence, 34-2, vol 1, no 1-31 (14 June 1989) (Jean Chretien), online: *Canadian Parliamentary Historical Resources*, <[parl.canadiana.ca/view/oop.com\\_HOC\\_3402\\_54\\_1/181?r=0&s=1](http://parl.canadiana.ca/view/oop.com_HOC_3402_54_1/181?r=0&s=1)>.
- House of Commons, Standing Committee on National Health and Welfare, Evidence, 33-2, vol 1, no 1-21 (13 May 1987) (Otto Jelinek), online: *Canadian Parliamentary Historical Resources*, <[parl.canadiana.ca/view/oop.com\\_HOC\\_3302\\_49\\_1/675?r=0&s=1](http://parl.canadiana.ca/view/oop.com_HOC_3302_49_1/675?r=0&s=1)>.
- House of Commons, Sub-Committee on Fitness and Amateur Sport, *Minutes of Proceeding and Evidence*. 34-3, vol 1, no 1-6 (20 May 1992) (Pierre Cadiuex), online: *Canadian Parliamentary Historical Resources*, <[parl.canadiana.ca/view/oop.com\\_HOC\\_3403\\_45\\_1/1?r=0&s=1](http://parl.canadiana.ca/view/oop.com_HOC_3403_45_1/1?r=0&s=1)>.
- Munro, John, *A Proposed Sports Policy for Canadians* (Ottawa: Department of National Health and Welfare, 1970).
- Privacy Commissioner of Canada, *Drug Testing and Privacy* (Ottawa: Minister of Supply and Services, 1990).



Regan, Gerald. *A Challenge to the Nation: Fitness and Amateur Sport in the '80s* (Ottawa: Minister of State, Fitness and Amateur Sport, 1981).

Report of the Work Group to the Secretary of State (Amateur Sport), *A Win-Win Solution: Creating a National Alternate Dispute Resolution System for Amateur Sport in Canada* (May 2000), online: *Sport Dispute Resolution Centre of Canada*, <[www.crdsc-sdrcc.ca/eng/documents/Working-Group-Report-e.pdf](http://www.crdsc-sdrcc.ca/eng/documents/Working-Group-Report-e.pdf)>.

Sport Canada, *Canadian Policy on Penalties for Doping in Sport* (Ottawa: Minister of State, Fitness and Amateur Sport, 1991).

———, *Drug Use and Doping Control in Sport: A Sport Canada Policy* (Ottawa: Minister of State, Fitness and Amateur Sport, 1984).

———, *Drug Use and Doping Control in Sport: A Sport Canada Policy, Update (September 1985)* (Ottawa: Minister of State, Fitness and Amateur Sport, 1985).

———, *Sport Canada Strategy on Ethical Sport 2010* (Ottawa: Canadian Heritage, 2011).

### **Primary Resources: Non-Government Documents**

Alpine Canada, *Financial Statements* (30 April 2018), online: *Alpine Canada*, <[alpinecanada.org/uploads/documents/2018\\_Audited\\_YEFS.pdf](http://alpinecanada.org/uploads/documents/2018_Audited_YEFS.pdf)>.

Athletics Nova Scotia, “Unattached Nova Scotia: Add Members” (last visited 16 August 2019), online: *Trackie*, <[www.trackie.com/members/UN-NS.php](http://www.trackie.com/members/UN-NS.php)>.

BC Amateur Athletics Association, *Financial Statements for the Year Ended March 31, 2018* (25 July 2018), online: *BC Athletics*, <[www.bcathletics.org/admin/js/elfinder/files/2018%20AGM/2018%20Reports/7.1%20-%20Audit%202017-2018.pdf](http://www.bcathletics.org/admin/js/elfinder/files/2018%20AGM/2018%20Reports/7.1%20-%20Audit%202017-2018.pdf)>.

Bicycle Nova Scotia, “Declaration” (last visited 16 August 2019), online: *Zone 4*, <[zone4.ca/register.asp?id=19683&lan=1&cartlevel=0&addfamily=>](http://zone4.ca/register.asp?id=19683&lan=1&cartlevel=0&addfamily=>)>.

Canadian Anti-Doping Agency, “By-laws” (18 March 1992) [unpublished, on file with the author].

Canadian Centre for Ethics in Sport, *2015 Canadian Anti-Doping Program* (1 September 2017), online: *CCES*, <[cces.ca/sites/default/files/content/docs/pdf/cces-policy-cadp-2015-v2-e.pdf](http://cces.ca/sites/default/files/content/docs/pdf/cces-policy-cadp-2015-v2-e.pdf)>.

———, *Annual Report 2017-2018* (Ottawa: CCES, 2018).

———, “By-laws” (28 August 2014) [unpublished, on file with the author].

- Costa, Jean Paul, “Legal Opinion Regarding the Draft 3.0 Revisions of the World Anti-Doping Code” (25 June 2013) at pp 12-15, online: *WADA*, <[www.wada-ama.org/en/resources/legal/legal-opinion-on-the-draft-2015-world-anti-doping-code](http://www.wada-ama.org/en/resources/legal/legal-opinion-on-the-draft-2015-world-anti-doping-code)>.
- , “Opinion for the World Anti-Doping Agency (WADA), September-October 2017” (14 December 2017), online: *WADA*, <[www.wada-ama.org/en/resources/legal/legal-opinion-on-the-isccs-by-judge-jean-paul-costa](http://www.wada-ama.org/en/resources/legal/legal-opinion-on-the-isccs-by-judge-jean-paul-costa)>.
- Court of Arbitration for Sport, *Arbitration Rules Applicable to the CAS Anti-Doping Division* (2019), online: *Court of Arbitration for Sport*, <[www.tas-cas.org/fileadmin/user\\_upload/CAS\\_ADD\\_Rules\\_final\\_version\\_2019\\_.pdf](http://www.tas-cas.org/fileadmin/user_upload/CAS_ADD_Rules_final_version_2019_.pdf)>.
- , *Code of Sports Related Arbitration* (in force as of 1 January 2019) at R44.2, R57, online: *CAS* <[www.tas-cas.org/fileadmin/user\\_upload/Code\\_2019\\_en\\_.pdf](http://www.tas-cas.org/fileadmin/user_upload/Code_2019_en_.pdf)>.
- Cross-Country Ski de Fond Canada, *Financial Statements* (31 March 2018), online: *Cross Country Canada* <[www.cccski.com/getmedia/29500d5b-2857-4047-a4a1-1f7b6e02a5d9/201803-Financial-Statements-Approved-by-Board.pdf.aspx](http://www.cccski.com/getmedia/29500d5b-2857-4047-a4a1-1f7b6e02a5d9/201803-Financial-Statements-Approved-by-Board.pdf.aspx)>.
- GGFL Chartered Professional Accountants, *Canadian Centre for Ethics in Sport Financial Statements for the Year Ended March 31, 2018* (Ottawa: GGFL, 20 June 2018), online: *CCES*, <[www.cces.ca/annual-reports](http://www.cces.ca/annual-reports)>.
- International Olympic Committee, *Olympic Charter* (in force from 26 June 2019) (Lausanne: IOC).
- Kaufman-Kohler, Gabrielle, Giorgio Malinverni, & Antonio Rigozzi. “Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law” (Geneva, 2003), online: *WADA*, <[www.wada-ama.org/en/resources/legal/conformity-with-international-law](http://www.wada-ama.org/en/resources/legal/conformity-with-international-law)>.
- Sport Dispute Resolution Centre of Canada, *Canadian Sport Dispute Resolution Code* (in force from 1 January 2015), online: *Sport Dispute Resolution Centre of Canada*, <[www.crdsc-sdrcc.ca/eng/dispute-resolution-code](http://www.crdsc-sdrcc.ca/eng/dispute-resolution-code)>.
- Sport Resolutions UK, *Arbitration Rules of Sport Resolutions* (August 2018), online: *Sport Resolutions*, <[www.sportresolutions.co.uk/uploads/related-documents/D\\_3\\_-\\_Arbitration\\_Rules.pdf](http://www.sportresolutions.co.uk/uploads/related-documents/D_3_-_Arbitration_Rules.pdf)>.
- Statistics Canada, *Regular Participation in Sports by Sex and Other Demographic Characteristics* (Ottawa: Statistics Canada, 2017), online: *Statistics Canada*, <[www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1310060201](http://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1310060201)>.
- Team Nova Scotia, *2019 Canada Winter Games Code of Conduct* [on file with the author].

- U SPORTS, “Policies and Procedures 90—Conduct and Enforcement: U SPORTS Anti-Doping Policy (Drug Education and Doping Control)” (August 2018), online: *U Sports*, <usports.ca/uploads/hq/By\_Laws-Policies-Procedures/2018/EN/Policy\_90.10\_Drug\_Education\_%282018-2019%29.pdf>.
- World Anti-Doping Agency, “2021 Code Review—First Consultation: Questions to Discuss and Consider” (last modified 4 June 2018), online: *WADA*, <www.wada-ama.org/sites/default/files/2018\_06\_04\_stakeholdercomments.pdf>.
- , *Athlete Biological Passport: Operating Guidelines*, version 7.1 (Montreal: WADA, June 2019) at para 1.2.2, online: *WADA*, <www.wada-ama.org/sites/default/files/resources/files/guidelines\_abp\_v71.pdf>.
- , “Contributions to WADA’s Budget” (19 July 2019), online: *WADA*, <www.wada-ama.org/en/resources/finance/contributions-funding>.
- , *Costs of Anti-Doping: Report of the WADA Working Group on Anti-Doping Costs* (WADA: The Hague, 2006).
- , *Doping Control Officer’s Training Tool Kit*, version 3.0 (Montreal: WADA, May 2011), online: *WADA*, <www.wada-ama.org/en/resources/education-and-awareness/doping-control-officers-dco-training-tool-kit>.
- , *Results Management, Hearings and Decisions Guidelines* (Montreal: WADA, October 2014).
- , *Sample Collection Personnel: Recruitment, Training, Accreditation and Re-Accreditation Guidelines* (Montreal: WADA, October 2014), online: *WADA*, <www.wada-ama.org/en/resources/world-anti-doping-program/guidelines-sample-collection-personel>.
- , *The World Anti-Doping Code International Standard: Prohibited List* (Montreal: WADA, January 2019), online: *WADA*, <www.wada-ama.org/sites/default/files/wada\_2019\_english\_prohibited\_list.pdf>.
- , *World Anti-Doping Code International Standard: Code Compliance by Signatories* (Montreal: WADA, April 2018), online: *WADA* <www.wada-ama.org/sites/default/files/resources/files/isccs\_april\_2018\_0.pdf>.
- , *World Anti-Doping Code International Standard: Laboratories* (Montreal: WADA, November 2019).
- , *World Anti-Doping Code International Standard: Protection of Privacy and Personal Information* (Montreal: WADA, June 2018), online: *WADA*, <www.wada-ama.org/en/resources/data-protection/international-standard-for-the-protection-of-privacy-and-personal>.

- , *World Anti-Doping Code International Standard: Therapeutic Use Exemptions* (Montreal: WADA, January 2019).
- , *World Anti-Doping Code International Standards: Testing and Investigations* (Montreal: Wada, January 2017), online: *WADA*, <[www.wada-ama.org/en/resources/world-anti-doping-program/international-standard-for-testing-and-investigations-isti](http://www.wada-ama.org/en/resources/world-anti-doping-program/international-standard-for-testing-and-investigations-isti)>.
- , *World Anti-Doping Code 2015* (with 2018 Amendments) (Montreal: WADA, 2018), online: *WADA*, <[www.wada-ama.org/en/resources/the-code/world-anti-doping-code](http://www.wada-ama.org/en/resources/the-code/world-anti-doping-code)>.

### Secondary Sources: Monographs & Chapters

- Barber, Katherine, ed, *Canadian Oxford Dictionary*, 2nd ed (Don Mills: Oxford University Press, 2004).
- Barnes, John, *Sports and the Law in Canada*, 3rd ed (Toronto: Butterworths, 1996).
- , *The Law of Hockey* (Toronto: LexisNexis, 2010).
- Beamish, Rob, “Olympic Ideals versus the Performance Imperative: The History of Canada’s Anti-Doping Policies” in Lucie Thibault & Jean Harvey, eds, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013) 217.
- Beloff, Michael J, “Is There a *Lex Sportiva*” in Robert Siekmann, & Janwillem Soek, eds, *Lex Sportiva: What Is Sports Law?* (The Hague: Asser, 2012) 69.
- Coughlan, Steve, *Canadian Law Dictionary*, 7th ed (Hauppauge, New York: Barron’s, 2013).
- Currie, John, *Public International Law*, 2nd ed (Toronto: Irwin Law, 2008).
- Davis, Timothy, “What is Sports Law?” in Robert Siekmann & Janwillem Soek, eds, *Lex Sportiva: What is Sports Law* (The Hague: Springer, 2012) 359.
- Findlay, Hilary, *Sex Discrimination in Sport: An Update* (Ottawa: CAAWS, 2012).
- Fraser, Graham, “Official Languages and the Canadian Sport System: Steady Progress, Constant Vigilance Needed” in Lucie Thibault & Jean Harvey, eds, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013) 351.
- Haas, Ulrich & Deborah Healey, eds, *Doping in Sport and the Law* (Oxford: Hart Publishing, 2015).
- Harvey, Jean, “Multi-Level Governance and Sport Policy in Canada” in Lucie Thibault & Jean Harvey, eds, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013) 37.

- , “Sport, Politics, and Policy,” in Jane Crossman, ed, *Canadian Sport Sociology*, 2nd ed (Scarborough: Thomson Nelson, 2007) 221.
- Healey, Deborah, “The Myth of the Level Playing Field in Sport” in Ulrich Haas & Deborah Healey, eds, *Doping in Sport and the Law* (Oxford: Hart Publishing, 2015) 3.
- Henne, Kathryn, *Testing for Athlete Citizenship: Regulating Doping and Sex in Sport* (New Brunswick, New Jersey: Rutgers, 2015).
- Houlihan, Barrie, *Sport, Policy and Politics: A Comparative Analysis* (New York: Routledge, 2002).
- Kikulus, Lisa, “Contemporary Policy Issues in High Performance Sport” in Lucie Thibault & Jean Harvey, eds, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013) 97.
- Macintosh, Donald, Thomas Bedecki & CES Franks, *Sport and Politics in Canada: Federal Government Involvement Since 1961* (Kingston: McGill-Queen’s University Press, 1987).
- McCloy, Cora & Lucie Thibault, “Hosting Policies of Sport Events” in Lucie Thibault & Jean Harvey, eds, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013) 243.
- Nafziger, James, “Lex Sportiva” in Robert Siekmann & Janwillem Soek, eds, *Lex Sportiva: What Is Sports Law?* (The Hague: Asser, 2012) 53.
- , “The Principle of Fairness in the *Lex Sportiva* of CAS Awards and Beyond” in Robert Siekmann & Janwillem Soek, eds, *Lex Sportiva: What Is Sports Law?* (The Hague: Asser, 2012) 251.
- Sharpe, Robert & Kent Roach, *The Charter of Rights and Freedoms*, 6th ed (Toronto: Irwin Law, 2017).
- Soek, Janwillem, *The Strict Liability Principle and the Human Rights of Athletes in Doping Cases* (The Hague: Asser Press, 2006).
- Thibault, Lucie & Jean Harvey, “Introduction” in Lucie Thibault & Jean Harvey, eds, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013) 1.
- , “The Evolution of Federal Sport Policy from 1960 to Today” in Lucie Thibault & Jean Harvey, eds, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013) 11.
- , eds, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013).

## Secondary Sources: Journals

- Barnes, John, "Recent Developments in Canadian Sports Law" (1991) 23:3 Ottawa L Rev 623.
- Bonte, Pieter, Sigrid Sterckx & Guido Pennings, "May the Blessed Man Win: A Critique of the Categorical Preference for Natural Talent over Doping as Proper Origins of Athletic Ability" (2014) 39 J Medicine & Philosophy 368.
- Chaster, Sarah, "Cruel, Unusual, And Constitutionally Infirm: Mandatory Minimum Sentences in Canada" (2018) 23 Appeal 89.
- Christiansen, Ask Vest & Rasmus Møller, "Who is More Skilful? Doping and its Implication on the Validity, Morality and Significance of the Sporting Test" (2016) 4 Performance Enhancement & Health 123.
- de Hon, Olivier, "The Redundancy of the Concept of 'Spirit of Sport' in Discussions on the Prohibited List of Doping Substances" (2017) 9:4 Intl J Sport Policy & Politics 667.
- Denham, Bryan E, "*Sports Illustrated*, the 'War on Drugs,' and the Anabolic Steroid Control Act of 1990" (1997) 21:3 J Sport & Social Issues 260.
- De Pencier, Joseph, "Law and Athlete Drug Testing in Canada" (1994) 4:2 Marq Sports L Rev 260.
- Dimeo, Paul, "The Myth of Clean Sport and its Unintended Consequences" (2016) 4 Performance Enhancement & Health 103.
- Downie, Rachelle, "Improving the Performance of Sport's Ultimate Empire: Reforming the Governance of the Court of Arbitration for Sport" (2011) 12 Melbourne J Intl L 315.
- Efverström, Anna, Åsa Bäckström, Nader Ahmadi & David Hoffe, "Contexts and Conditions for a Level Playing Field: Elite Athletes' Perspectives on Anti-Doping in Practice" (2016) 5 Performance Enhancement & Hlth 77.
- Exner, Jan, "Anti-Doping and Athletes' Rights under EU Law: Four-Year Period of Ineligibility as Disproportionate Sanction?" (2018) 17 Intl Sports LJ 128.
- Feidler, Stefan, "Fundamental rights of International Athletes in the Court of Arbitration for Sports [*sic*] Viewed through the Eyes of the US Constitution in Cases Involving Anti-Doping" (2013) 3:2 Resolved: J Alternative Dispute Resolution 9.
- Gleaves, John & Matthew Llewellyn, "Sport, Drugs and Amateurism: Tracing the Real Cultural Origins of Anti-Doping Rules in International Sport" (2014) 31:8 Intl J History of Sport 839.

- Goldsworthy, Daniel, "Athletes' Rights under the World Anti-Doping Code: A Legitimate Public Interest?" (2018) 43:3 *Alternative LJ* 197.
- Henne, Kathryn, "WADA, the Promise of Law and the Landscapes of Antidoping Regulation" (2010) 33:2 *Political & Leg Anthropology Rev* 306.
- Henning, April D & Paul Dimeo, "The New Front in the War on Doping: Amateur Athletes" (2017) 51 *Intl J Drug Policy* 128.
- Hoff, David, "Doping, Risk, and Abuse: An Interview Study of Elite Athletes with a History of Steroid Use" (2012) 1:2 *Performance Enhancement & Health* 61.
- Houlihan, Barrie, "Civil Rights, Doping Control and the World Anti-doping Code" (2004) 7:3 *Sport in Society*, 420.
- Jedlicka, Scott, "The Normative Discourse of Anti-Doping Policy" (2014) 6:3 *Intl J Sport Policy & Politics* 429.
- Jose, Steffi, "From Sport's Kangaroo Court to Supreme Court: How the Court of Arbitration for Sport Can Legitimize Anti-Doping Law" (2014) 20 *Sw J Intl L* 401.
- Koch, David, Jaewon Lee, & Kyunghye Lee, "Coloring the War on Drugs: Arrest Disparities in Black, Brown, and White" (2016) 8:4 *Race & Social Problems* 313.
- La Gerche, Andre, & Maria Brosnan, "Cardiovascular Effects of Performance-Enhancing Drugs" (2017) 135:1 *Circulation* 89.
- Libman, Rick, "Is Presuming Guilt for Regulatory Offences still Constitutional but Wrong? *R v Wholesale Travel Group* and Section 1 of the *Charter of Rights and Freedoms* 20 Years After" (2012) 43:3 *Ottawa L Rev* 455.
- Loland, Sigmund & Michael McNamee, "The 'Spirit of Sport,' WADA's Code Review, and the Search for Overlapping Consensus" (2019) 11:2 *Intl J Sport Policy & Politics* 325.
- MacAloon, John J, "Steroids and the State: Dubin, Melodrama and the Accomplishment of Innocence" (1990) 2:2 *Public Culture* 41.
- MacDonald, Scott, "Drug Testing in the Canadian Workplace," (2009) 5:3 *Visions J* 23, online: *Here to Help*, <[www.heretohelp.bc.ca/visions/workplaces-vol5/drug-testing-in-the-canadian-workplace](http://www.heretohelp.bc.ca/visions/workplaces-vol5/drug-testing-in-the-canadian-workplace)>.
- Macedo, Emmanuel, "WADA and Imperialism? A Philosophical Look into Anti-Doping and Athletes as Coloniser and Colonised" (2018) 10:3 *Intl J Sport Policy & Politics* 415.

- Maennig, Wolfgang, "Inefficiency of the Anti-Doping System: Cost Reduction Proposals" (2014) 49:9 Substance Use and Misuse 1201.
- Møller, Verner, "The Road to Hell is Paved with Good Intentions—A Critical Evaluation of WADA's Anti-Doping Campaign" (2016) 4 Performance Enhancement & Health 111.
- Møller, Verner & Paul Dimeo, "Anti-Doping—The End of Sport" (2014) 6:2 Intl J Sport Policy & Politics 259.
- Mullan, David & Deirdre Harrington, "The *Charter* and Administrative Decision-Making: The Dampening Effects of *Blencoe*" (2002) 27 Queen's LJ 879.
- Overbye, Marie, "Doping Control in Sport: An Investigation of How Elite Athletes Perceive and Trust the Functioning of the Doping Testing System in their Sport" (2016) 19 Sport Management Rev 6.
- Provine, Doris Marie, "Race and Inequality in the War on Drugs" (2011) 7 Annual Rev L & Social Science 41.
- Ritchie, Ian & Greg Jackson, "Politics and 'Shock': Reactionary Anti-Doping Policies in Canadian and International Sport" (2014) 6:2 Intl J Sport Policy & Politics 195.
- Ritchie, Ian, "Pierre de Coubertin, Doped 'Amateurs' and the 'Spirit of Sport': The Role of Mythology in Olympic Anti-Doping Policies" (2014) 31:8 Intl J History of Sport 820.
- , "The Construction of a Policy: The World Anti-Doping Code's 'Spirit of Sport' Clause" (2013) 2 Performance Enhancement & Health 194.
- Ryan, Kevin, "Doping and Anti-Doping: the Excesses of Enterprise and the Tyranny of Transparency" (2015) 7:4 Intl J Sport Policy & Politics 637.
- Ryder, Bruce, "The Little Sisters Case, Administrative Censorship, and Obscenity Law" (2001) 39:1 Osgoode Hall LJ 207.
- Safai, Parissa, "The Demise of the Sport Medicine and Science Council of Canada" (2005) 36 Sport History Rev 91.
- Straubel, Michael, "Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can do Its Job Better" (2005) 36:4 Loy U Chicago LJ 1203.
- Strelan, Peter & Robert J Boeckmann, "Why Drug Testing in Elite Sport Does Not Work: Perceptual Deterrence Theory and the Role of Personal Moral Beliefs" (2006) 36:12 J Applied Social Psychology 2909.



- Todd, Jan & Daniel Rosenke, “‘The Event that Shook the Whole World Up’: Historicizing the 1983 Pan-American Games Doping Scandal” (2016) 1:2 Intl J History of Sport 164.
- Waddington, Ivan & Verner Møller, “WADA at Twenty: Old Problems and Old Thinking?” (2019) 11:2 Intl J Sport Policy & Politics 219.
- Wagner, Ulrik & Dag Vidar Hanstad, “Scandinavian Perspectives on Doping—a Comparative Policy Analysis in Relation to the International Process of Institutionalizing Anti-Doping” (2011) 3:3 Intl J Sport, Policy & Politics 355.
- Young, Margot, “The IOC Made Me Do It: Women’s Ski Jumping, VANOC and the 2010 Winter Olympics.” (2010) 18:3 Const Forum Const 95.

### Secondary Sources: News Media & News Releases

- Abrahamson, Alan, “Coleman Case Out because USADA Doesn’t do Basic it Demands of Athletes: Know the Rules” (2 September 2019), online: *Wire Sports* <[www.3wiresports.com/articles/2019/9/2/q671frgu0owwde6y4mykn44y72s0aw](http://www.3wiresports.com/articles/2019/9/2/q671frgu0owwde6y4mykn44y72s0aw)>
- Anderson, David, “Mike Tyson: I Used a Fake Willie to Fool Drug-Testers and Fought on Cocaine” *The Mirror* (12 November 2013), online: *Mirror*, <[www.mirror.co.uk/sport/boxing/mike-tyson-used-fake-penis-2785451](http://www.mirror.co.uk/sport/boxing/mike-tyson-used-fake-penis-2785451)>.
- Campbell, Meagan, “‘I Had a Dream to Wrestle Like the Canadians’: Daniel Igali on Winning Gold—and Finding Family—in Canada,” *Maclean’s* (29 June 2014), online: *Maclean’s*, <[www.macleans.ca/news/canada/daniel-igali-had-a-dream-to-wrestle-like-a-canadian/](http://www.macleans.ca/news/canada/daniel-igali-had-a-dream-to-wrestle-like-a-canadian/)>.
- Canada Soccer, News Release, “Government of Canada Announces Funding to Canada Soccer for the 2026 FIFA World Cup™” (23 May 2019), online: *Canada Soccer* <[www.canadasoccer.com/government-of-canada-announces-funding-to-canada-soccer-for-the-2026-fifa-world-cup-in-canada-mexico-and-the-united-states-p162192](http://www.canadasoccer.com/government-of-canada-announces-funding-to-canada-soccer-for-the-2026-fifa-world-cup-in-canada-mexico-and-the-united-states-p162192)>.
- Canadian Cyclist, “Drouin Receives Four Year Suspension” (26 March 2018), online: *Canadian Cyclist*, <[www.canadiancyclist.com/dailynews.php?id=33582](http://www.canadiancyclist.com/dailynews.php?id=33582)>.
- , “Quebec Rider Drouin Tests Positive for Banned Substance” (1 May 2017), online: *Canadian Cyclist*, <[www.canadiancyclist.com/dailynews.php?id=32439](http://www.canadiancyclist.com/dailynews.php?id=32439)>.
- Court of Arbitration for Sport, Media Release, “The European Court of Human Rights (ECHR) Rejects the Request of Claudia Pechstein to Refer Her Case to the Grand Chamber of the ECHR” (5 February 2019), online: *CAS*, <[www.tas-cas.org/fileadmin/user\\_upload/Media\\_Release\\_Pechstein\\_ECHR\\_GC.pdf](http://www.tas-cas.org/fileadmin/user_upload/Media_Release_Pechstein_ECHR_GC.pdf)>.

- “Doping Will Not Be a Criminal Offence, Sports Minister Tracey Crouch Says” *ITV News* (24 October 2017), online: *ITV*, <[www.itv.com/news/2017-10-24/doping-will-not-be-a-criminal-offence-sports-minister-tracey-crouch-says/](http://www.itv.com/news/2017-10-24/doping-will-not-be-a-criminal-offence-sports-minister-tracey-crouch-says/)>.
- European Court of Human Rights, Press Release, ECHR018 (2017), “Doping Control: Whereabouts Requirement Does Not Breach Convention” (18 January 2018).
- Ewing, Lori, “Anti-Doping Rules a Bureaucratic Nightmare for Canadian Athletes,” *The Canadian Press* (4 December 2012), online: *The Toronto Star*, <[www.thestar.com/sports/olympics/2012/12/04/antidoping\\_rules\\_a\\_bureaucratic\\_nightmare\\_for\\_canadian\\_athletes.html](http://www.thestar.com/sports/olympics/2012/12/04/antidoping_rules_a_bureaucratic_nightmare_for_canadian_athletes.html)>.
- Federal-Provincial-Territorial Conference of Ministers Responsible for Sport, Recreation and Fitness, News Release, “Ministers Adopt New Canadian Policy on Doping in Sport” (30 April 2004), online: *Canadian Intergovernmental Conference Secretariat*, <[scics.ca/en/product-produit/news-release-ministers-adopt-new-canadian-policy-on-doping-in-sport/](http://scics.ca/en/product-produit/news-release-ministers-adopt-new-canadian-policy-on-doping-in-sport/)>.
- Findlay, Mary Lou & Ian Parker, “Canadian Athletes Caught Cheating at 1983 Pan Am Games,” *CBC: The Journal* (24 August 1983), online: *CBC Archives* <[www.cbc.ca/archives/entry/canadian-athletes-caught-in-caracas](http://www.cbc.ca/archives/entry/canadian-athletes-caught-in-caracas)>.
- Franks, Rebecca, “Blind Paralympian Banned from Competing After his Guide Tested Positive for a Banned Substance” (26 August 2019), online: *News.Com.Au*, <[www.news.com.au/sport/olympics/athletics/blind-paralympian-banned-from-competing-after-his-guide-tested-positive-for-banned-substance/news-story/b88eebde3ef826229f7ecab20c06a893](http://www.news.com.au/sport/olympics/athletics/blind-paralympian-banned-from-competing-after-his-guide-tested-positive-for-banned-substance/news-story/b88eebde3ef826229f7ecab20c06a893)>.
- Goodyear, Sheena, “Anti-Doping Agencies Can’t Keep Pace with the Science of Cheating,” *CBC News* (11 November 2015), online: *CBC*, <[www.cbc.ca/sports/doping-cheats-culture-1.3312294](http://www.cbc.ca/sports/doping-cheats-culture-1.3312294)>.
- Government of Canada Fitness and Amateur Sport, News Release, “Danis Unveils Anti-Doping Strategy” (9 January 1991), online: *CCES*, <[cces.ca/sites/default/files/content/docs/pdf/goc-mr-cadoannouncement-e.pdf](http://cces.ca/sites/default/files/content/docs/pdf/goc-mr-cadoannouncement-e.pdf)>.
- Harrington, Tom, “Weightlifter Still Stigmatized 20 Years after Pan Am Scandal,” *CBC* (6 February 2002), online: *CBC*, <[www.cbc.ca/player/play/1743498426](http://www.cbc.ca/player/play/1743498426)>.
- Johannsen, Dana, “Drug Free Sport NZ’s Testing Regime Ineffective in Fight Against Doping” (26 September 2018), online: *Stuff*, <[www.stuff.co.nz/sport/other-sports/106848886/drug-free-sport-nzs-testing-regime-ineffective-in-fight-against-doping](http://www.stuff.co.nz/sport/other-sports/106848886/drug-free-sport-nzs-testing-regime-ineffective-in-fight-against-doping)>.
- Leicester, John, “In Shaming 90-Year-Old Rider, Anti-Doping Earns a Black Eye,” *Associated Press* (9 January 2019), online: *AP News*, <[apnews.com/8d6d024054db45b89ab3f8b422558c73?fbclid=IwAR0qfiqQzLfyPT02S2YR7aIm4-Ciji5RjIYyVPg\\_jw85LXgnUmNOeSNQRko](http://apnews.com/8d6d024054db45b89ab3f8b422558c73?fbclid=IwAR0qfiqQzLfyPT02S2YR7aIm4-Ciji5RjIYyVPg_jw85LXgnUmNOeSNQRko)>.

- Passa, Dennis, “Swimming Australia’s Glass House Comes Crashing Down with Positive Doping Samples,” *The Associated Press* (30 July 2019), online: *CBC*, <[www.cbc.ca/sports/olympics/aquatics/australia-swimming-positive-doping-sample-1.5230017](http://www.cbc.ca/sports/olympics/aquatics/australia-swimming-positive-doping-sample-1.5230017)>.
- Robinson, Matt, “Far-Reaching Sports Waivers under Scrutiny after Court Decision,” *Vancouver Sun* (19 June 2017), online: *Vancouver Sun*, <[vancouver.sun.com/news/local-news/far-reaching-waivers-under-scrutiny-after-court-decision](http://vancouver.sun.com/news/local-news/far-reaching-waivers-under-scrutiny-after-court-decision)>.
- Robson, Lynn, “World Anti-Doping Agency Chooses Canada for its Headquarters,” *CBC: The National* (21 August 2001), online: *CBC Archives* <[www.cbc.ca/archives/entry/world-anti-doping-agency-chooses-canada-for-headquarters](http://www.cbc.ca/archives/entry/world-anti-doping-agency-chooses-canada-for-headquarters)>.
- Ruiz, Rebecca, “U.S. Lawmakers Seek to Criminalize Doping in Global Competitions” *New York Times* (12 June 2018), online: *New York Times* <[www.nytimes.com/2018/06/12/sports/american-doping-criminal-law.html](http://www.nytimes.com/2018/06/12/sports/american-doping-criminal-law.html)>.
- Smurthwaite, James, “Interview: Martin Maes—‘I’m Not Guilty ... I Just Made a Stupid Mistake’” (27 June 2019), online: *Pink Bike*, <[www.pinkbike.com/news/interview-martin-maes-ews-failed-drug-test-im-not-guilty-i-just-made-a-stupid-mistake.html](http://www.pinkbike.com/news/interview-martin-maes-ews-failed-drug-test-im-not-guilty-i-just-made-a-stupid-mistake.html)>.
- St Cyr Clarke, Natalie, “The Legality of the Anti-Doping Whereabouts Rules: An Analysis of the FNASS v France Human Rights Case” (14 March 2018), online: *Law in Sport*, <[www.lawinsport.com/topics/sports/item/the-legality-of-the-anti-doping-whereabouts-rules-an-analysis-of-the-fnass-v-france-human-rights-case](http://www.lawinsport.com/topics/sports/item/the-legality-of-the-anti-doping-whereabouts-rules-an-analysis-of-the-fnass-v-france-human-rights-case)>.
- “Vancouver 2010 Winter Olympic Debt-Free VANOC Final Report Says,” *The Canadian Press* (3 July 2014), online: *CBC*, <[www.cbc.ca/news/canada/british-columbia/vancouver-2010-winter-olympics-debt-free-vanoc-final-report-says-1.2695994](http://www.cbc.ca/news/canada/british-columbia/vancouver-2010-winter-olympics-debt-free-vanoc-final-report-says-1.2695994)>.
- Westhead, Rick, “Drug Testing: Wheelchair Athlete Jeff Adams Fights for his Reputation,” *The Star* (17 July 2012), online: *The Star*, <[www.thestar.com/sports/olympics/2012/07/17/drug\\_testing\\_wheelchair\\_athlete\\_jeff\\_adams\\_fights\\_for\\_his\\_reputation.html](http://www.thestar.com/sports/olympics/2012/07/17/drug_testing_wheelchair_athlete_jeff_adams_fights_for_his_reputation.html)>.
- Wilt, James, “Implementing UNDRIP is a Big Deal for Canada. Here’s What You Need to Know,” *The Narwhal* (12 December 2017), online: *The Narwhal*, <[thenarwhal.ca/implementing-undrip-big-deal-canada-here-s-what-you-need-know/](http://thenarwhal.ca/implementing-undrip-big-deal-canada-here-s-what-you-need-know/)>.
- World Anti-Doping Agency, “WADA Welcomes ECHR Decision to Back Whereabouts Rule” (18 January 2018), online: *WADA* <[www.wada-ama.org/en/media/news/2018-01/wada-welcomes-echr-decision-to-back-whereabouts-rules](http://www.wada-ama.org/en/media/news/2018-01/wada-welcomes-echr-decision-to-back-whereabouts-rules)>.

“World Anti-Doping Agency Headquarters Will Stay in Montreal until 2013,” *CBC News* (15 November 2017), online: *CBC*, <[www.cbc.ca/news/canada/montreal/world-anti-doping-agency-headquarters-will-stay-in-montreal-until-2031-1.4404435](http://www.cbc.ca/news/canada/montreal/world-anti-doping-agency-headquarters-will-stay-in-montreal-until-2031-1.4404435)>.

### Secondary Sources: Websites

“Beckie Scott” (last visited 14 September 2019), online: *Olympic.ca*, <[olympic.ca/team-canada/beckie-scott/](http://olympic.ca/team-canada/beckie-scott/)>.

Canadian Centre for Ethics in Sport, “Accessibility” (last visited 11 September 2019), online: *CCES*, <[www.cces.ca/accessibility](http://www.cces.ca/accessibility)>.

———, “Athletes’ Rights and Responsibilities” (last visited 16 August 2019), online: *CCES*, <[cces.ca/athletes-rights-and-responsibilities](http://cces.ca/athletes-rights-and-responsibilities)>.

———, “CCES Email and Internet Restored” (last visited 07 September 2019), online: *CCES*, <[cces.ca/cces-email-and-internet-restored](http://cces.ca/cces-email-and-internet-restored)>.

———, “Course Outline: True Sport Clean 101” (last visited 24 September 2019), online: *CCES* <[cces.ca/course-outline](http://cces.ca/course-outline)>.

———, “Education and E-Learning” (last visited 11 September 2019), online: *CCES*, <[www.cces.ca/education-and-e-learning](http://www.cces.ca/education-and-e-learning)>.

———, “Governance” (last visited 01 September 2019), online: *CCES*, <[www.cces.ca/governance](http://www.cces.ca/governance)>.

———, “History of Anti-Doping in Canada,” (last visited 14 August 2019), online: *CCES* <[cces.ca/history-anti-doping-canada](http://cces.ca/history-anti-doping-canada)>.

———, “Mission and Vision” (last visited 01 September 2019), online: *CCES*, <[www.cces.ca/mission-and-vision](http://www.cces.ca/mission-and-vision)>.

———, “Sample Collection Procedures” (last visited 16 August 2019), online: *CCES*, <[www.cces.ca/sample-collection-procedures](http://www.cces.ca/sample-collection-procedures)>.

———, “The Values Proposition: building a Stronger Canada through Values-Based Sport” (last visited 23 September 2019), online: *CCES*, <[www.cces.ca/values-proposition-building-stronger-canada-through-values-based-sport](http://www.cces.ca/values-proposition-building-stronger-canada-through-values-based-sport)>.

Court of Arbitration for Sport, “Frequently Asked Questions” (last visited 11 September 2019), online: *CAS*, <[www.tas-cas.org/en/general-information/frequently-asked-questions.html](http://www.tas-cas.org/en/general-information/frequently-asked-questions.html)>.

DATAAC, “Drug Testing in Canada—Part One” (14 November 2017), online: *DATAAC*, <[datac.ca/drug-testing-canada-part-one/](http://datac.ca/drug-testing-canada-part-one/)>.

- McNamee, MJ, “The Spirit of Sport and Anti-Doping Policy: an Ideal Worth Fighting For” (21 February 2013), online: *WADA*, <[www.wada-ama.org/en/media/news/2013-02/the-spirit-of-sport-and-anti-doping-policy-an-ideal-worth-fighting-for](http://www.wada-ama.org/en/media/news/2013-02/the-spirit-of-sport-and-anti-doping-policy-an-ideal-worth-fighting-for)>.
- Nichols, Paula & Chloe Morrison, “History of Team Canada Olympic Medal Upgrades” (1 December 2018), online: *Olympic.ca*, <[olympic.ca/2018/12/01/history-of-team-canada-olympic-medal-upgrades/](http://olympic.ca/2018/12/01/history-of-team-canada-olympic-medal-upgrades/)>.
- Nordiq Canada, “The Firth Sisters: Northern Lights” (10 January 2011), online: *Cross Country Canada*, <[www.cccski.com/About/History/Our-Olympians/The-Firth-Sisters--Northern-Lights-%281%29.aspx#.XWNmV1ATHUo](http://www.cccski.com/About/History/Our-Olympians/The-Firth-Sisters--Northern-Lights-%281%29.aspx#.XWNmV1ATHUo)>.
- , “The History of TEST” (28 December 2010), online: *Cross Country Canada*, <[www.cccski.com/About/History/Photos-and-Stories/The-History-of-T-E-S-T--\(1\).aspx#.XWNnQ1ATHUo](http://www.cccski.com/About/History/Photos-and-Stories/The-History-of-T-E-S-T--(1).aspx#.XWNnQ1ATHUo)>.
- Own the Podium, “About OTP” (last visited 16 August 2019), online: *Own the Podium*, <[www.ownthepodium.org/About-OTP](http://www.ownthepodium.org/About-OTP)>.
- True Sport, “What is True Sport” (last visited 17 September 2019), online: *True Sport* <[truesportpur.ca/aboutus](http://truesportpur.ca/aboutus)>.
- UNESCO, “Background to the Convention” (last visited 15 August 2019), online: *UNESCO*, <[www.unesco.org/new/en/social-and-human-sciences/themes/anti-doping/international-convention-against-doping-in-sport/background/](http://www.unesco.org/new/en/social-and-human-sciences/themes/anti-doping/international-convention-against-doping-in-sport/background/)>.
- , “International Convention against Doping in Sport. Paris, 19 October 2005” (last visited 15 August 2019), online: *UNESCO*, <[www.unesco.org/eri/la/convention.asp?KO=31037&language=E](http://www.unesco.org/eri/la/convention.asp?KO=31037&language=E)>.
- , “International Convention against Doping in Sport: States Parties” (last visited 23 September 2019), online: *UNESCO*, <[www.unesco.org/new/en/social-and-human-sciences/themes/anti-doping/international-convention-against-doping-in-sport/states-parties/](http://www.unesco.org/new/en/social-and-human-sciences/themes/anti-doping/international-convention-against-doping-in-sport/states-parties/)>.
- United Nations Treaty Collection, “Glossary” (last visited 17 September 2019), online: *United Nations Treaty Collection*, <[treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1\\_en.xml](http://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml)>.
- World Anti-Doping Agency, “2021 Code Review” (last visited 17 September 2019), online: *WADA*, <[www.wada-ama.org/en/what-we-do/the-code/2021-code-review](http://www.wada-ama.org/en/what-we-do/the-code/2021-code-review)>.
- , “Accredited Laboratories” (last visited 17 September 2019), online: *WADA*, <[ww.wada-ama.org/en/what-we-do/science-medical/laboratories/accredited-laboratories](http://www.wada-ama.org/en/what-we-do/science-medical/laboratories/accredited-laboratories)>.

- , “ADAMS” (last visited 11 September 2019), online: *WADA*, <[www.wada-ama.org/en/what-we-do/adams](http://www.wada-ama.org/en/what-we-do/adams)>.
- , “Athlete Biological Passport” (last visited 16 August 2019), online: *WADA*, <[www.wada-ama.org/en/athlete-biological-passport](http://www.wada-ama.org/en/athlete-biological-passport)>.
- , “Compliance Monitoring Program” (last visited 15 August 2019), online: *WADA*, <[www.wada-ama.org/en/compliance-monitoring-program](http://www.wada-ama.org/en/compliance-monitoring-program)>.
- , “Governance” (last visited 22 August 2019), online: *WADA*, <[www.wada-ama.org/en/governance](http://www.wada-ama.org/en/governance)>.
- , “National Anti-Doping Organizations (NADO)” (last visited 15 August 2019), online: *WADA*, <[www.wada-ama.org/en/who-we-are/anti-doping-community/national-anti-doping-organizations-nado](http://www.wada-ama.org/en/who-we-are/anti-doping-community/national-anti-doping-organizations-nado)>.
- , “The Code” (last visited 16 August 2019), online: *WADA* <[www.wada-ama.org/en/what-we-do/the-code](http://www.wada-ama.org/en/what-we-do/the-code)>.

#### **Secondary Sources: Other**

- Athletics Integrity Unit, “Provisional Suspensions in Force” (last updated 16 August 2019), online: *Athletics Integrity*, <[www.athleticsintegrity.org/disciplinary-process/provisional-suspensions-in-force](http://www.athleticsintegrity.org/disciplinary-process/provisional-suspensions-in-force)>.
- Barnett, Laura. “Canada’s Approach to the Treaty-Making Process” (24 November 2011, last revised on 05 August 2018) at 3.3.1, online: *Library of Parliament*, <[lop.parl.ca/sites/PublicWebsite/default/en\\_CA/ResearchPublications/200845E](http://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/200845E)>.
- Burkel, Laurel, *Cups, Cowbells, Medals and, Flags: Sport and National Identity in Germany, 1936-2006* (Thesis: Naval Postgraduate School, 2006) [unpublished].
- Canada, Employment and Social Development Canada, “Workplace Impairment Questions and Answers” (last modified 20 June 2019), online: *Canada* <[www.canada.ca/en/employment-social-development/services/health-safety/cannabis-workplace/questions-answers.html](http://www.canada.ca/en/employment-social-development/services/health-safety/cannabis-workplace/questions-answers.html)>.
- Canada Human Rights Commission, *Impaired at Work—A Guide to Accommodating Substance Dependence* (Ottawa: CHRC, 2018), online: <[www.chrc-ccdp.gc.ca/eng/content/impaired-work-guide-accommodating-substance-dependence](http://www.chrc-ccdp.gc.ca/eng/content/impaired-work-guide-accommodating-substance-dependence)>.
- Canadian Olympic Team, “Competition is difficult enough on its own, let alone when you’re struggling with your identity or worrying about if the people around will accept you for who you are” (17 August 2019), online: *Instagram*, <[www.instagram.com/p/B1RIaPNDKwk/?utm\\_source=ig\\_web\\_copy\\_link](http://www.instagram.com/p/B1RIaPNDKwk/?utm_source=ig_web_copy_link)>.

- Daly, Paul, “Modes of Rights Protection II: Slight Communications Inc. v. Davidson, [1989] 1 SCR 1038” (14 December 2016), online: *Administrative Law Matters*, <[www.administrativelawmatters.com/blog/2016/12/14/modes-of-rights-protection-ii-slight-communications-inc-v-davidson-1989-1-scr-1038/](http://www.administrativelawmatters.com/blog/2016/12/14/modes-of-rights-protection-ii-slight-communications-inc-v-davidson-1989-1-scr-1038/)>.
- Dugré, Mélanie, “Mtre Richard W Pound” (22 August 2017), online: *The Bar of Montreal* <[www.barreaudemontreal.qc.ca/en/avocats/mtre-richard-w-pound](http://www.barreaudemontreal.qc.ca/en/avocats/mtre-richard-w-pound)>.
- Duncan, Kirsty, “Sport strengthens confidence, promotes healthy lifestyles and helps build communities. Yesterday’s announcement of nearly \$1M for 2 years to @AboriginalSport helps provide Indigenous youth in Alberta they skills they need to build strong, healthy communities” (13 August 2019 at 10:55), online: *Twitter* <[twitter.com/KirstyDuncanMP/status/1161335587523182592](https://twitter.com/KirstyDuncanMP/status/1161335587523182592)>.
- Government of Canada, “Federal Corporation Information - 271193-1” (last modified 22 May 2019), online: *Innovation, Science and Economic Development Canada*, <[www.ic.gc.ca/app/scr/cc/CorporationsCanada/fdrlCrpDtls.html?corpId=2711931&V\\_TOKEN=1556389325349&crpNm=canadian%20centre%20for%20ethics%20in%20sport&crpNmbr=&bsNmbr=>](http://www.ic.gc.ca/app/scr/cc/CorporationsCanada/fdrlCrpDtls.html?corpId=2711931&V_TOKEN=1556389325349&crpNm=canadian%20centre%20for%20ethics%20in%20sport&crpNmbr=&bsNmbr=>)>.
- Jenkins, Caitlin, *Establishing a World Anti-Doping Code: WADA’s Impact on the Development of an International Strategy for Anti-Doping in Sport* (Masters Thesis, University of Windsor Faculty of Human Kinetics, 2006) [unpublished].
- Marriott-Lloyd, Paul, *Understanding the International Convention Against Doping in Sport* (UNESCO, 2010).
- Shirley, Renee Anne, “It's not about missing whereabouts...Ath's can train anywhere in world they want incl remote locations. It is their life so they gladly fill in ADAMS. NADOs don't attempt test them as will cost \$\$ to send DCO team abroad & travel long distances to test them where they are training” (31 August 2019 at 5:46), online: *Twitter*, <[twitter.com/RAnneShirley/status/1167780606689910785](https://twitter.com/RAnneShirley/status/1167780606689910785)>.
- Union Cyclist International, “Licence Holders Provisionally Suspended as per the UCI Anti-Doping Rules” (last updated 12 August 2019), online: *UCI*, <[www.uci.org/docs/default-source/clean-sport-documents/adrv/provisional-suspensions-en.pdf?sfvrsn=14d705b4\\_154](http://www.uci.org/docs/default-source/clean-sport-documents/adrv/provisional-suspensions-en.pdf?sfvrsn=14d705b4_154)>.
- World Anti-Doping Agency, “Code Signatories,” (last visited 17 September 2019), online: *WADA*, <[www.wada-ama.org/en/what-we-do/the-code/code-signatories#GovernmentFundedOrganizations](http://www.wada-ama.org/en/what-we-do/the-code/code-signatories#GovernmentFundedOrganizations)>.