

USING CANADIAN LAW TO PREVENT, RESPOND TO AND  
REMEDY MALTREATMENT IN SPORT: LISTENING TO  
AND LEARNING FROM ATHLETES

by

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## **DEDICATION**

To Gen, for her exceptional strength and bravery, and for having the guts to take an initiative that changed many lives and inspired this thesis. To all of the athlete respondents and parent respondents, for sharing their pain, their hopes and their personal stories. I am genuinely overwhelmed by their courage and unwavering commitment to creating a better future for athletes.

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## Table of Contents

Abstract .....	viii
Acknowledgements.....	ix
Chapter One - Introduction .....	1
1.1 The Issue .....	1
1.2 The Aim of This Thesis .....	6
1.3 Athlete Maltreatment: Stakeholders and Advocacy .....	9
Chapter Two - Law and Regulation of Sport.....	17
2.1 Introduction.....	17
2.1.1 Should Sport Regulation be a Public or Private Matter? .....	19
2.1.2 Global Sports Law and International Sports Law .....	25
2.1.3 The Swiss Court of Arbitration for Sport (CAS).....	26
2.2 International Conventions and Other Instruments .....	27
2.3 Canadian Legislation, Declarations and Policy .....	38
2.4 Administrative Law .....	40
2.4.1 Sport Tribunals.....	40
2.4.2 Human Rights Tribunals .....	44
2.4.3 Criminal Law .....	47
2.4.4 Civil Law .....	59
2.5 Conclusion .....	63

Chapter Three - Literature Review .....	65
3.1 Introduction.....	65
3.2 History.....	65
3.3 Concepts and Terminology .....	72
3.4 Maltreatment Subcategories: .....	77
3.5 The Academic Literature on Sport Maltreatment: A Thematic Review.....	86
3.5.1 Historic Male Dominance and Masculine Hegemony in Sport .....	86
3.5.2 Insufficient Public and Sport Specific Education on Issues of Athlete Maltreatment .....	93
3.5.3 Distorted Priorities Within Sport .....	97
3.5.4 Self-Regulation of Sport Organizations.....	99
3.6 The Role of Scholars, Policy and Law.....	106
3.7 Conclusion .....	112
Chapter Four - A Qualitative Case Study of Canadian Athletes: Methods .....	113
4.1 Sample, Representation and Data Collection.....	113
4.2 Data Analysis .....	115
4.3 Protection of Personally Identifiable Information .....	116
4.4 Study Limitations.....	117
4.5 Reliability or Trustworthiness.....	118
Chapter - Five Qualitative Study Results.....	121

5.1 Introduction - Sport Culture and Athlete Impacts From Maltreatment .....	121
5.2 Athlete Impacts .....	122
5.2.1 Social and Personal Harm .....	123
5.2.2 Physical Harm .....	126
5.2.3 Psychological Harm .....	129
5.2.4 Financial Harm .....	132
5.2.5 Professional Harm .....	132
5.3 Sport Culture .....	134
5.3.1 Historic Male Dominance and Inequality in Sport .....	135
5.3.2 Insufficient Education on Maltreatment Issues in Sport .....	156
5.3.4 Self-Regulation of Sport Organizations .....	165
5.3.5 Distorted Priorities Within the Sport World .....	179
5.4 Conclusion: Valuing Athletes .....	184
Chapter Six - Recommendations .....	186
6.1 Overview .....	186
6.2 Current Initiatives .....	187
6.3 Athlete Recommendations .....	189
6.4 The Downfall of Safe Sport Measures .....	194
6.4.1 Sport Culture and Tradition .....	194
6.4.2 The Need for Disruptive Innovation .....	194

6.4.3 Problems With Current Safe Sport Systems .....	196
6.4.4 Why Individual Approaches to Athlete Protections Fail .....	199
6.4.5 Belief Systems .....	200
6.4.6 Institutional Characteristics That Perpetuate Sport Maltreatment .....	204
6.4.7 Tangible and Intangible Factors That May Affect Athlete Maltreatment .....	207
6.4.8 Professional Touching .....	209
6.4.9 Athlete Vulnerability .....	211
6.5 Recommendations and Legislative Proposals.....	212
6.5.1 Mandatory Reporting Legislation .....	212
6.5.2 Physical Activity and Sport Act.....	222
6.5.3 Labour Legislation.....	224
6.5.4 Criminal Law .....	231
6.5.5 Independent International or National Regulatory Authority .....	238
6.5.6 Athlete Voice .....	242
6.5.7 Codes of Conduct.....	244
6.5.8 Education .....	246
6.6 Conclusions:.....	248
Chapter Seven - Conclusion.....	249
Bibliography .....	254
Appendix A - Athlete Impacts .....	302

Appendix B - Sport Culture .....	303
Appendix C .....	304
Request Letter .....	304
Transcription Confidentiality Agreement .....	305
Informed Consent Form .....	307
Part II: Certificate of Consent .....	313
Statement by the Researcher .....	314
Research Interview Questions: .....	315
Research Questions French Version Questions d'entretien .....	318

## **ABSTRACT**

This thesis addresses maltreatment of athletes in Canada, in the post-Nassar era, by considering applicable law, policy, academic literature and a qualitative study. Athlete maltreatment may include: psychological, physical and sexual maltreatment, and neglect. Prevalence and impacts of maltreatment are examined. Legal and administrative options available to complainants are discussed, as well as applicable international human rights and child rights conventions, Canadian legislation, legal principles, and jurisprudence. An academic literature review provides maltreatment definitions in order to lay the groundwork for the discussion. Academic perspectives and proposals for redress are considered. A qualitative athlete study produced four key themes which may negatively impact athletes: lack of education on maltreatment, distorted priorities, self-regulation by sport organizations and a discriminatory sport culture. Fortunately, many athletes and academics are united in a mission to promote a new holistic vision that prioritizes the health and wellbeing of athletes rather than athletic victories.



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# CHAPTER ONE - INTRODUCTION

## 1.1 The Issue

Sexual abuse at USA Gymnastics dominated international news headlines for many months in 2017 and 2018. US Olympic team doctor Larry Nassar, was convicted of sexually abusing hundreds of athletes over some twenty years for which Nassar received three consecutive prison sentences for up to 175 years.<sup>1</sup> The long delay in bringing Nassar to judgement is hard to comprehend, particularly in light of the numerous complaints against him going back at least as far as 1997.<sup>2</sup>

"Over the course of at least 20 years of consistent abuse, women and girls reported to every proximate authority. They told their parents. They told gymnastics coaches, running coaches, softball coaches. They told Michigan State University police and Meridian Township police. They told physicians and psychologists. They told university administrators. They told, repeatedly, USA Gymnastics. They told one another."<sup>3</sup>

The lack of due process for the athletes appears to have occurred because Nassar was a highly revered medical practitioner which meant that people trusted and believed him, consequently the voices of the athletes were not heard.<sup>4</sup>

Unfortunately, such incidents are not unique occurrences. A Canadian study of amateur sport sexual violence was conducted by the Canadian Broadcasting Company (CBC) news and sports departments in 2019.<sup>5</sup> The results of their review of Canadian court records and media articles revealed that in the last twenty years, 340 coaches were

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<sup>1</sup> Margo Mountjoy, "'Only by Speaking Out Can We Create Lasting Change': What Can We Learn From the Dr Larry Nassar Tragedy?" (2019) 53:1 *Brit J Sports Med* 57 at 57.

<sup>2</sup> Kerry Howey, "Everyone Believed Larry Nassar: The Predatory Trainer May Have Just Taken Down USA Gymnastics. How Did He Deceive so Many for so Long?", *New York Magazine* (19 November 2018).

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

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

<sup>5</sup> Jesse Campigotto, "A Shocking Portrait of Sexual Abuse in Sports and Some Good Advice for Parents", *CBC Sports* (11 February 2019).

convicted of sexual offences against athletes under 18 years of age. There were 600 reported complainants, 222 convictions and 34 ongoing cases, spanning 36 different sports.<sup>6</sup>

The CBC sport sexual abuse report, and the many follow up media stories, created shockwaves in the Canadian public as these numbers established conclusively that athlete sexual abuse is a serious and ongoing problem.<sup>7</sup> The findings were not surprising to Canadian academics, such as Sandra Kirby, who estimates that actual figures are considerably higher than the CBC report suggests.<sup>8</sup> Even more problematic is the tendency for such media exposés to focus exclusively on the most sensational category of athlete maltreatment, that of sexual abuse. Academic work has consistently shown that maltreatment usually happens on a continuum, or as Roberts, Soho and Grant concluded, psychological abuse is behind all other types of abuse.<sup>9</sup> Consequently addressing one type of maltreatment, without examining the others, is an unlikely path to change.

Gretchen Kerr is one of the authors of a 2019 Canadian national team athlete maltreatment study.<sup>10</sup> She says,

Although most of the attention to-date has been focused on experiences of sexual abuse, the findings indicate that athletes

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<sup>6</sup> Lori Ward & Jamie Strashin, “Sex Offences Against Minors: Investigation Reveals More Than 200 Canadian Coaches Convicted in Last 20 Years”, *CBC Sports* (10 February 2019).

<sup>7</sup> Note: Although media reports can be helpful in bringing social issues to the forefront, they frequently follow a pattern. Stan Cohen explains that society is prone to periods of “moral panic” during which emotionally triggering issues are presented in a stereotypical way by the media. Politicians engage professionals to find quick solutions, after which the issue slips out of sight. See Stan Cohen, “Moral Panics and Folk Concepts” (1999) 35:3 *Paedagogica Historica* 585 at 591; According to Celia Brackenridge, the root causes of these problem are usually not addressed. See Celia Brackenridge, *Spoilsports: Understanding and Preventing Sexual Exploitation in Sport* (London, Routledge, 2001) at 21.

<sup>8</sup> Staff, “Sexual Abuse of Minors Pervades Canadian Youth Sports”, *CBC Sports* (11 February 2019).

<sup>9</sup> Victoria Roberts, Victor Sojo & Felix Grant, “Organizational Factors and Non-Accidental Violence in Sport: A Systematic Review” (2020) 23:1 *Sport Mgmt Rev* 8 at 13.

<sup>10</sup> Gretchen Kerr, Erin Wilson & Ashley Stirling, in partnership with AthletesCan, “Prevalence of Maltreatment Among Current and Former National Team Athletes” (30 April 2019), online: <[https://athletescan.com/sites/default/files/images/prevalence\\_of\\_maltreatment\\_reporteng.pdf](https://athletescan.com/sites/default/files/images/prevalence_of_maltreatment_reporteng.pdf)>.

experience psychological abuse and neglect to a far greater extent than other forms. Most troubling are that neglectful and psychologically harmful behaviours such as the use of demeaning, threatening or humiliating comments, and denying basic needs such as food, water, and safe training conditions, are accepted as normal practices in sport.<sup>11</sup>

In addition, academics, like Kerr and Kirby, recognize that the CBC figures on athlete sexual abuse do not provide an accurate representation of the problem because sexual abuse is known to be consistently underreported.<sup>12</sup> The Kerr, Wilson, Stirling maltreatment study revealed that only 15% of athletes, who had experienced abuse, discrimination or bullying, reported the incident.<sup>13</sup> The CBC data revealed that 600 sexual offences were reported by Canadian athletes over twenty years. When sexual harassment cases are included in statistics, along with sexual abuse, figures usually increase dramatically. In 2011, in the United Kingdom, there were 652 reported cases, of sport-related harassment and maltreatment in one year.<sup>14</sup>

In the USA, there were more than 3,500 maltreatment complaints reported to the Center for Safe Sport in their first two years of operation.<sup>15</sup> Monthly reports of athlete sexual abuse and maltreatment, received by the Center, rose to 239 per month in 2019, an increase of 55% over the previous year.<sup>16</sup> The dramatic increase suggests that it takes time, and the establishment of trust, before athletes will put their faith in a new reporting system.

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<sup>11</sup> *Ibid.*

<sup>12</sup> Brackenridge, *supra* note 7 at 50 and 63; Mike Hartill, “The Sexual Abuse of Boys in Organized Male Sports” (2009) 12:2 *Men & Masculinities* 225 at 225.

<sup>13</sup> Kerr, *supra* note 10.

<sup>14</sup> Celia Brackenridge & Daniel Rhind, “Child Protection in Sport: Reflections on Thirty Years of Science and Activism” (2014) 3 *J Soc Sci* 326 at 328.

<sup>15</sup> Associated Press, “Sexual Abuse and Misconduct Claims in US Olympic Sports rise by 55% in 2019”, *The Guardian* (17 September 2019).

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

One of the very first comprehensive studies on athlete sexual abuse was a Canadian study by Kirby, Greaves and Hankivsky, published in the book, *The Dome of Silence* in 2000.<sup>17</sup> The study revealed that more than 1 in 5 athletes on Canadian national sports teams, who responded to the survey, indicated that they had had sexual relations with a sport authority who was in a position of power over them.<sup>18</sup>

Athletes have been shown to be more likely to report sexual offences when more general language is used in posing the survey questions.<sup>19</sup> A Norwegian study, in 2003, asked athletes about their experiences using the term, “sexual harassment by an authority figure”, and in this case, 42% of athlete respondents gave affirmative replies.<sup>20</sup> This suggests that the pervasiveness of athlete maltreatment can only be understood if definitions are carefully and consistently worded, and if they are inclusive of all forms of maltreatment, not just focused on sexual abuse.

The 2019 Kerr, Wilson, Stirling survey of 764 current, and 237 retired, Canadian national team members produced the following figures on athlete maltreatment: psychological abuse (17% current, 23% retired); neglect (15%, 22%); sexual abuse(4%, 7%); and physical abuse(3%, 5%).<sup>21</sup>

Another study by Kerr and Stirling determined that prevalence of athlete sexual abuse can range between 2% and 42%.<sup>22</sup> The vast range of this scale makes it clear that the actual numbers of athletes who experience sexual abuse are unknown. In addition to low

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<sup>17</sup> Sandra Kirby, Lorraine Greaves & Olena Hankivsky, *The Dome of Silence: Sexual Harassment and Abuse in Sport* (Halifax: Fernwood Publishing, 2000).

<sup>18</sup> *Ibid* at 82.

<sup>19</sup> Kari Fasting, Celia Brackenridge & Jorunn Sundgot-Borgen, “Experiences of Sexual Harassment and Abuse among Norwegian Elite Female Athletes and Nonathletes” (2003) 74:1 *Research Q Exercise & Sport* 84 at 91.

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

<sup>21</sup> Kerr, *supra* note 10.

<sup>22</sup> Gretchen Kerr & Ashley Stirling, “Where is Safeguarding in Sport Psychology Research and Practice?” (2019) *J Applied Sport Psych* 1 at 4, online: <<https://doi.org/10.1080/10413200.2018.1559255>>.

levels of reporting by athletes,<sup>23</sup> Kerr and Stirling blame inconsistent definitions and subjective interpretations for what constitutes sexual abuse, as well as variation in samples, lack of survey response,<sup>24</sup> and methods of data analysis.<sup>25</sup> This problem of varied definition and interpretation is also true for other forms of athlete maltreatment.<sup>26</sup> In order to address this inconsistency, chapters two and three of this thesis will provide comprehensive definitions of harassment, sexual offences and the various types of athlete maltreatment, as well as examining their social and legal implications.

International awareness about the prevalence of athlete maltreatment is increasing. Maltreatment and sexual abuse studies like the one from Kerr, Wilson, and Stirling,<sup>27</sup> and the recent CBC exposé,<sup>28</sup> have made it evident that athlete maltreatment is a pervasive and ongoing problem in Canada. It is also clear that our current methods of prevention, investigation and dispute resolution are inadequate. The impact of athlete maltreatment has not been widely studied thus far,<sup>29</sup> however the academic data is constantly expanding.<sup>30</sup> The Kerr, Wilson, Stirling survey queried national team athletes on maltreatment repercussions. The survey respondents revealed that: 15% and 22%, of current and retired national team athletes respectively, engaged in disordered eating behaviours; 5% and 6 % engaged in self-harm; and 13% and 20% had had suicidal thoughts.<sup>31</sup>

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<sup>23</sup> Brackenridge, *supra* note 7, at 50 and 63; Hartill, *supra* note 12 at 225.

<sup>24</sup> Kate Alexander & Anne Stafford, *Children and Organised Sport* (Edinburgh: Dunedin Academic Press, 2011) at 15.

<sup>25</sup> Ashley Stirling & Gretchen Kerr, "Defining and Categorizing Emotional Abuse in Sport" (2008) 8:4 *Euro J Sport Sci* 173.

<sup>26</sup> *Ibid.*

<sup>27</sup> Kerr, *supra* note 10.

<sup>28</sup> Campigotto, *supra* note 5.

<sup>29</sup> Kari Fasting & Kristin Walseth, "Consequences of Sexual Harassment in Sport for Female Athletes" (2002) 8:2 *J Sexual Aggression* 37 at 40.

<sup>30</sup> Roberts, *supra* note 9 at 6.

<sup>31</sup> Kerr, *supra* note 10.

Studies on short and long term impacts for non-athlete sexual abuse survivors have produced considerable information and this data may be cautiously applied to sport sexual abuse, and in some cases it may have relevance for other types of maltreatment as well.<sup>32</sup> Potential harms for sexual abuse survivors are wide ranging and it is generally accepted that it can take decades before the full impact of the sexual abuse is experienced and recognized.<sup>33</sup> Not surprisingly, delayed symptoms also appear to be common with other forms athlete maltreatment.<sup>34</sup> The Kerr, Wilson, Stirling findings show that negative consequences may appear many years after retirement.<sup>35</sup>

## 1.2 The Aim of This Thesis

This thesis will give voice to the lived experiences of athletes, by documenting not just sexual abuse, but also all other forms of athlete maltreatment, some of which have been misunderstood and largely ignored. The aim of this thesis is to look at ways in which law can address all types of maltreatment in sport, by drawing on the existing literature, as well as an original qualitative empirical study.

Twelve current and retired Canadian elite athletes and two parents of current Canadian elite athletes provided the data that formed the foundation for this thesis. Two additional athletes and one athlete parent provided feedback at the member validation stage.<sup>36</sup> The perspectives and recommendations of the study participants were shared with the researcher during semi-structured qualitative interviews. In order to ensure that athlete voices are heard, this thesis will supplement legal discussions, and a review of the

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<sup>32</sup> Terri Lewis et al, “Does the Impact of Child Sexual Abuse Differ From Maltreated But Non-Sexually Abused Children? A Prospective Examination of the Impact of Child Sexual Abuse on Internalizing and Externalizing Behavior Problems” (2016) 51 *Child Abuse & Neglect* at 31.

<sup>33</sup> Trisha Leahy; Grace Pretty & Gershon Tenenbaum, “A Contextualized Investigation of Traumatic Correlates of Childhood Sexual Abuse in Australian Athletes” (2008) 6:4 *Int J Sport & Exercise Psych* at 366; Fasting, *supra* note 29 at 44; Mannat Mohanjeet Singh; Shradha S Parsekar & Sreekumaran N Nair, “An Epidemiological Overview of Child Sexual Abuse” (2014) 3:4 *J Fam Med & Primary Care* at 430.

<sup>34</sup> Kerr, *supra* note 10. See also Lewis, *supra* note 32, for a maltreatment impact study on non-athletes.

<sup>35</sup> Kerr, *supra* note 10.

<sup>36</sup> Note: The entire group will hereafter be referred to as “athlete respondents”.

academic literature, with athlete, and athlete parent, insights to provide anecdotes and commentary in their own words.<sup>37</sup>

All interview participants expressed ongoing frustration and concern about inadequate Canadian athlete protections, ineffective or non-existent reporting mechanisms, unfollowed protocol, lacklustre screening and a complete lack of remedies for athlete survivors of sexual abuse and athlete maltreatment. The athlete respondents, and the parents of athletes, provided over thirty hours of feedback for this study, and their contributions identified four key issues which clearly demand improvement.

There are a number of issues that emerge from the athlete respondent data. I will cover these issues in the various chapters of this thesis and utilize them as themes to structure the discussion and recommendations provided in this thesis. The first issue that emerged is the issue of self-regulation. Self-regulation frequently prevents athletes from reporting maltreatment because many athletes believe their complaints will not be held in confidence and that the repercussions from such complaints could negatively impact their athletic careers.

The second issue identified by the athletes and parents is sport-wide education. Education could increase athlete awareness about their rights, make coaches, administrators, communities and sport organizations more aware of their duties and increase sensitivity to athlete needs. Education could encourage bystanders to bring maltreatment complaints forward and could make sport organizations more responsive to those complaints. The third issue demanding attention is that of sport priorities. Research has increasingly shown that in order to get the best performances from athletes, and for sport to have the greatest positive impact on the health and wellbeing of our communities, sport goals must be holistic rather than focused on winning.<sup>38</sup>

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<sup>37</sup> Note: In order to protect the anonymity of the athletes and their parents all personal and place names as well as references to particular sports, sport organizations, sport championships and sport titles will be omitted.

<sup>38</sup> Kerr, *supra* note 10.



The final issue, and perhaps the most challenging of all, is that of sport culture, and in particular, the historical sport culture of misogyny and male dominance. Changing culture is always a slow process, but there has been encouraging success in other previously male-dominated institutions, such as employment and education. Sport has long lagged behind in this evolution, but nothing will actually change until stakeholders in the sport world genuinely embrace principles of inclusion, equality and wellness.

This cultural overhaul needs to happen, not just in the written mandates and stated policies of international, national and provincial organizations, nor just at annual general meetings or during educational workshops. Change needs to be felt by every stakeholder, at every local club, at the day to day level where it will impact the experiences of all children, youth and adults who are engaged in all facets of sport.

In this thesis, these four themes; self-regulation, education, priorities and culture, will be explored, grounded in current law and regulation as well as in the existing literature. The thesis will be organized as follows: this opening chapter will, in the following subsection, provide a short description of existing organizations that advocate on behalf of athletes, in order to provide a context for the legal and regulatory issues discussed in Chapter Two. This will also illustrate how the issue of athlete maltreatment is gaining worldwide momentum and recognition, making this study particularly timely.

Chapter Two will establish definitions for key terms before moving on to focus specifically on the application of law in addressing athlete maltreatment. It will look at overlapping private and public interests, and the arguments for self-regulation versus independent decision-making authorities. Relevant international and national conventions, declarations, legislation, policy and codes of conduct will be discussed. The chapter will also identify and briefly discuss some precedent setting Canadian and international cases.

Chapter Three will examine the work of prominent academics writing about maltreatment in sport. Their work identifies situational and cultural issues that may contribute to maltreatment pervasiveness and lack of reporting. Consideration will be given to the impacts of financial pressure, sponsorship, politics and the role of sport culture.

Chapter Four will detail the methodology used in the qualitative study associated with this thesis. The fifth chapter will provide a full report on the results of the data analysis, discussing emergent themes from the study, with extensive athlete commentary supported by academic writing. The sixth chapter will take the significant themes from Chapter Five and make recommendations engaging potential applications of existing Canadian and international law as discussed in Chapter Two. The final chapter, Chapter Seven, will conclude with a plan of action and work to be done in the future.

### **1.3 Athlete Maltreatment: Stakeholders and Advocacy**

Many national and international organizations are working to represent the rights of athletes and other sport stakeholders in a responsible and ethical fashion. Agencies addressing athlete maltreatment tend to fall into one, or a combination of, the following three categories: sport agencies, humanitarian agencies and children's rights agencies.<sup>39</sup> Understanding organizational mission is important because that mission often impacts the kind of policy that is created and the way it is implemented.

The Sports and Rights Alliance (SRA), is an international sport organization with a humanitarian mission. It was founded in 2015 by sports federations working with international non-profits and trade unions after concerns about human rights and environmental violations associated with the 2014 Sochi Winter Olympics.<sup>40</sup> The SRA addressed breaches of personal and property rights, and police violence, prior to the 2016 Rio Olympics. The mandate of the SRA is to ensure that international sports events, or mega-sporting events (MSE), as they call them, are executed in a way that avoids corruption and respects human, environmental and labour rights. SRA policies and

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<sup>39</sup> Brackenridge & Rhind, *supra* note 14 at 332.

<sup>40</sup> Sport and Rights Alliance, online:  
<<http://www.sportandhumanrights.org/wordpress/index.php/2015/07/06/sport-and-rights-alliance/>>.

principles, must be respected throughout the MSE process, from the initial bidding phase, through to event conclusion.<sup>41</sup>

The long range impact of the SRA is still to be determined, but it appears to be an important step toward addressing the human rights issues associated with major international sporting events. As is often the case, there is a concern that an organization with such a broad international scope, combined with its variation in membership, objectives and interests, may not be able to provide effective representation for the specific needs of individuals. It may also come down to whether individual needs continue to be a priority when they directly conflict with corporate MSE objectives.

Another promising international sport organization with a humanitarian mission is the Global Centre for Sport and Human Rights (CSHR). The CSHR was founded in 2018, at the behest of the SRA, and it operates out of Geneva. The CSHR initially received sponsorship from the Institute for Human Rights and Business (HRB), but it will become independent in 2021.<sup>42</sup> The inaugural CSHR chair is former President of Ireland, and former UN High Commissioner for Human Rights, Mary Robinson.<sup>43</sup>

The CSHR mandate is to prevent and remedy international human rights abuses in sport at both the individual and organizational level.<sup>44</sup> Reports of sport-related human rights abuses, presented at their third annual conference in 2019, confirmed for conference attendees that the work of the CSHR had just begun.<sup>45</sup> Again, the unanswered question is whether an organization with such an ambitious international mission is capable of

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<sup>41</sup> Sport and Rights Alliance, “Sporting Chance Principles on Human Rights in Mega-Sporting Events”, online: <[http://www.sportandhumanrights.org/wordpress/wp-content/uploads/2016/12/Sporting\\_Chance\\_Principles\\_on\\_Human\\_Rights\\_in\\_Mega-Sporting\\_Events\\_-\\_Oct.\\_2016.pdf](http://www.sportandhumanrights.org/wordpress/wp-content/uploads/2016/12/Sporting_Chance_Principles_on_Human_Rights_in_Mega-Sporting_Events_-_Oct._2016.pdf)>.

<sup>42</sup> *Supra* note 41, online: <<https://www.sporhumanrights.org/en/about/overview>>.

<sup>43</sup> Human Rights Watch, “New Global Center for Sport and Human Rights: Center Could Help Fight Pervasive Rights Abuses in World of Sports” (26 June 2018), online: <<https://www.hrw.org/news/2018/06/26/new-global-center-sport-and-human-rights>>.

<sup>44</sup> *Supra* note 42.

<sup>45</sup> *Supra* note 42, online: <<https://www.sporhumanrights.org/scf-2018>>.

meeting the specific needs of individuals impacted by sport human rights abuses world wide.

There are numerous humanitarian sport organizations that do have entirely humanitarian-driven mandates. These organizations have long recognized the need to protect the wellbeing of individuals involved in sport. Examples of international organizations engaged in this mission include: the World Health Organization (WHO),<sup>46</sup> the United Nations (UN)<sup>47</sup>, and until recently, the United Nations subsidiary, the Office for Sport Development and Peace (UNOSDP).<sup>48</sup>

Humanitarian organizations such as these have sometimes used sport to aid disaster-relief or to promote sustainable development.<sup>49</sup> The UN Human Rights Council recognized that sport can help create awareness on issues of equality and discrimination, as well as supporting strategies for development and peace.<sup>50</sup> Other international organizations working in sport, but firmly embracing humanitarian priorities, include: Human Rights Watch,<sup>51</sup> and Right to Play.<sup>52</sup> Humanitarian-focused agencies such as these are not distracted by commercial goals or pursuit of medals, consequently they are able to make human wellbeing their top priority.<sup>53</sup>

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<sup>46</sup> World Health Organization, online: <<https://www.who.int>>.

<sup>47</sup> United Nations, online: <<https://www.un.org/en/>>.

<sup>48</sup> Note: The UNOSDP closed in 2017, at which time the work of the UNOSDP was moved to the UN Office for Economic and Social Affairs. See Mads A Wickstrøm, “UN Secretary-General Closes UNOSDP” *Play the Game* (11 May 2017) online: <[https://www.playthegame.org/news/news-articles/2017/0309\\_un-secretary-general-closes-unosdp/](https://www.playthegame.org/news/news-articles/2017/0309_un-secretary-general-closes-unosdp/)>.

<sup>49</sup> Sport and Development, online: <<https://www.sportanddev.org/en/connect/organisations-involved-sport-development>>.

<sup>50</sup> Mary Harvey, “Putting Respect for Human Rights at the Heart of Sport” *Open Global Rights* (21 February 2019) online: <<https://www.openglobalrights.org/putting-respect-for-human-rights-at-the-heart-of-sport/>>.

<sup>51</sup> Human Rights Watch, online: <<https://www.hrw.org>>.

<sup>52</sup> Right to Play, online: <<https://www.righttoplay.ca/en-ca/>>.

<sup>53</sup> Brackenridge & Rhind, *supra* note 14 at 328 and 332.

Children’s rights organizations, that is, government agencies and not for profits with child rights missions,<sup>54</sup> may have limited influence in international sport negotiations where their missions come into conflict with those of international sport federations whose objectives are often performance driven. To prevent such conflict, Brackenridge and Rhind propose creating balanced cross-sector partnerships between sport federations, corporations, government and not for profits to ensure that athlete wellbeing remains a key focus of project objectives.<sup>55</sup>

Other organizations with an interest in international human rights in sport include the professional athletes’ union, the World Players’ Association.<sup>56</sup> This group was founded in 2014 and is an affiliate of Global Union,<sup>57</sup> which represents trade workers. The World Players’ Association mission is to protect the rights of professional athletes and other sport professionals, while working to create a positive international impact from sport.<sup>58</sup> In 2019, Global Athlete, another athlete-focused organization was founded, this time to protect the interests of amateur athletes.<sup>59</sup>

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<sup>54</sup> Note: International organizations of this kind include: the United Nations Children’s Fund (UNICEF), and Save the Children. National organizations with a child social justice focus include: the Canadian Centre for Child Protection and the UK National Society for the Prevention of Cruelty to Children and its affiliate, the UK Child Protection in Sport Unit, as well as Child Protective Services in the United States.

<sup>55</sup> Brackenridge & Rhind, *supra* note 14 at 332 and 334.

<sup>56</sup> Global Union, online: <<https://www.uniglobalunion.org/sectors/sport/worldplayersunited>>.

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

<sup>58</sup> *Ibid.*

<sup>59</sup> Doug Harrison, “New Athlete-led Movement Aims to Drive Change Across the Sporting World”, *CBC Sports* (13 Feb 2019), online: <<https://www.cbc.ca/sports/olympics/global-athlete-movement-koehler-skinner-1.5016446>>.

Numerous organizations have taken the important step of adding athlete wellbeing to their existing agendas.<sup>60</sup> Such initiatives have led to Canada,<sup>61</sup> the United Kingdom,<sup>62</sup> the United States, and Australia<sup>63</sup> being touted as safe sport leaders. Other organizations have been formed specifically because of their safe sport mandate. ICoach Kids, is a not-for-profit led by a group of academic, coaching and sport organizations based in the EU.<sup>64</sup> Their rather pointed and slightly grumpy educational mission reads: “Because eight million coaches across the EU work with children and young people, but most of them hold lower level coaching qualifications or no qualifications at all.”<sup>65</sup>

Occasionally there has been effective international cooperation between humanitarian organizations and unrelated sports. The West Indies Cricket Board worked with Unicef in 2016 to create a Fair Play program and an extensive manual for child protection in the sport of cricket. This was later adapted to create an international child protection manual for the sport of football.<sup>66</sup>

In the United States, the mishandling of decades of abuse at USA Gymnastics led to the formation of US Safe Sport, in 2017. Their mission is to make sport holistic and athlete-centred and to end maltreatment in sport through prevention and education. This costly,

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<sup>60</sup> Coaching Association of Canada, online: <<https://www.coach.ca/for-parents-with-children-in-sport-p160715>>.

<sup>61</sup> Note: In Canada some of these safe sport organizations include: National Olympic Committees, AthletesCAN, Coaching Association of Canada, Responsible Coaching Movement, Canadian Centre for Ethics in Sport, the Canadian Red Cross, Respect in Sport, Safe Sport (Canada), Kids Help Phone, Canadian Sport Helpline and Commit to Kids programs.

<sup>62</sup> Note: The UK has been an international safe sport leader for many years, benefitting until recently, from the leadership of safe sport trailblazer, Celia Brackenridge. UK safe sport organizations include: Child Protection in Sport Unit (CPSU), Children 1st, the National Society for Prevention of Cruelty to Children (NSPCC), as well as the Children’s Society UK.

<sup>63</sup> Note: Australian safe sport efforts have come from: the Australian Sports Commission, Member Protection (Australia), and Play by the Rules, which recently added athlete safety and wellbeing to its mission. Sport Australia, the Australian Human Rights Commission, government departments of sport and human rights, the Office of the Children’s Guardian (NSW) and the NSW Anti-Discrimination Board are all committed to the Australian safe sport movement.

<sup>64</sup> ICoachKids, online: <<https://www.icoachkids.eu/about-us.html>>.

<sup>65</sup> *Ibid.*

<sup>66</sup> Unicef, “Child Protection in Football: What Every Coach Needs To Know”, online: <[https://www.unicef.org/ECAO\\_Child\\_Protection\\_in\\_Football.pdf](https://www.unicef.org/ECAO_Child_Protection_in_Football.pdf)>.

but seemingly comprehensive, national, athlete maltreatment strategy was created by a collection of activists, the US Olympic Committee, national sport federations and government officials. US Safe Sport gets its authority from the US Olympic & Paralympic Committees (USOPC) and other national sport governing bodies. It claims to be : “an independent nonprofit committed to building a sport community where participants can work and learn together free of emotional, physical and sexual abuse and misconduct....”.<sup>67</sup>

Unfortunately the US Safe Sport Centre is not completely free of issues. The organization only provides protection to athletes involved in official USOPC sports, which means it has no authority over university or professional athletes. Funding for US Safe Sport comes from congress, the USOPC, national sport governing bodies, as well as other donors. Additional revenue comes from education and training modules, offered at a cost, to sports outside of the USOPC.<sup>68</sup> The result is that the USOPC maintains considerable power over the “independent” organization.

Safe sport projects often find themselves in competition with other organizations which may have similar but competing missions. In the USA, one of these is Safe 4 Athletes USA,<sup>69</sup> a not-for-profit founded in 2011 by elite-athlete, sexual abuse survivor, Katherine Starr. Starr created Safe 4 Athletes to provide positive and safe sport training.<sup>70</sup>

When multiple organizations with similar mandates exist within one country, they often find themselves in competition for funding. Duplication of efforts creates inefficient spending. The result is overlapping programs made less effective by limited human and financial resources. Policy may be, consciously or unconsciously, influenced by each organization's particular agenda or bias.

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<sup>67</sup> US Center for Safe Sport, online: <<https://safesport.org>>.

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

<sup>69</sup> Safe 4 Athletes, online: <<http://safe4athletes.org/index.php/about-us/history>>.

<sup>70</sup> *Ibid.*

Sometimes organizational focus may encourage prioritization of goals other than the wellbeing of athletes. Some organizations may not possess complete independence, or freedom from the influence of their authorizing body. For example, the top priority for most Olympic committees and sport federations is to financially sustain their sport, or group of sports, through athletic success.<sup>71</sup> This means that although maltreatment of athletes may be taken seriously by an organization, the wellbeing of athletes will likely never supersede that primary goal. In other words, athlete maltreatment will be seriously addressed when those in power believe it is interfering with winning medals.<sup>72</sup>

In the meantime, the passion of each organization working to establish safe sport initiatives creates awareness and helps to drive local, national and international missions to eradicate athlete maltreatment. Nonetheless, it seems evident that a more efficient solution would involve the creation of a national or international safe sport authority. The recent introduction of the independent international Centre for Sport and Human Rights in Geneva appears to be just what athlete advocates, academics, sport stakeholders and humanitarians have been waiting for. It claims to provide long-awaited athlete protection from a funded, completely independent, global authority with the power to create policy, enforce compliance, receive complaints, carry out investigations, provide remedies, intervene and impose sanctions. The practical effectiveness of the CSHR is yet to be determined however. Unfortunately, the question still remains, how will desperate individuals and small local organizations benefit from the authority of this international body in Geneva? How will the CSHR help athletes experiencing maltreatment, labourers working in inhumane conditions while building sport facilities, or sport professionals persecuted for their gender, sexuality or religion?

International athlete maltreatment cases and the wide range of other human rights abuses in sport will likely prove too numerous for one international authority to handle. Effective solutions will require a coordinated effort at the local, national and international levels.

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<sup>71</sup> Brackenridge & Rhind, *supra* note 14 at 331.

<sup>72</sup> *Ibid* at 334.



Nationally and provincially, this could mean some form of government, or independent, involvement in sport regulation. Chapter Two will establish foundational definitions for key terms to be used throughout this thesis before entering the long-running debate about external regulation of sport governing bodies.

## CHAPTER TWO - LAW AND REGULATION OF SPORT

### 2.1 Introduction

Modern sport has evolved considerably from early eighteenth century beginnings in Britain, when it was an unruly local pastime centred on racing, fighting, games and gambling.<sup>1</sup> In the Victorian era, sport became a form of exclusive entertainment by which wealthy and privileged men were expected to learn discipline and build character.<sup>2</sup> The most recent profile of sport reveals a complicated, sophisticated and highly-regulated series of local, national and international activities, played and watched by individuals and teams, from various nationalities, religions, and genders. In some countries sport has also taken on a powerful cultural and political status.<sup>3</sup>

This chapter will discuss competing public and private interests in sport, as well as the pros and cons of self-regulation by sport organizations. I will draw attention to conventions, legislation, and policy that have been designed to create awareness, and/or to provide protection and remedy in cases of athlete maltreatment. Canadian sport sexual abuse and athlete maltreatment cases will be considered throughout the chapter. I will close with a discussion of the options for addressing athlete maltreatment issues under administrative, criminal, and civil law.

Sports law is a relatively new and emerging discipline.<sup>4</sup> Legal concepts such as criminal, contract, taxation, employment and competition law,<sup>5</sup> are increasingly being applied to resolve sporting conflicts that were previously resolved through internal mechanisms, and as a result, sport case law and legislation is developing.<sup>6</sup> New bodies for dispute

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<sup>1</sup> J Barnes, *Sports and the Law in Canada* (Toronto: Butterworths, 1996) at 4-7. Note: This is a Westernized version of sport history and does not take into account sports that would have been played, and may continue to be played, by indigenous people the world over.

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

<sup>3</sup> Simon Gardiner, et al, *Sports Law*, 4th ed (London: Routledge, 2012) at 24.

<sup>4</sup> *Ibid* at 86.

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

<sup>6</sup> *Ibid.*

resolution have been established, such as the International Court of Arbitration for Sport (CAS),<sup>7</sup> created in 1984. The European Commission developed a European Union Sports Policy in 2011,<sup>8</sup> and an international Centre for Sport and Human Rights(CSHR), launched in 2018.<sup>9</sup>

In the United States, a significant step in athlete protections came with the 2017 establishment of the US Center for Safe Sport in Colorado.<sup>10</sup> This body is authorized by the *Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017*,<sup>11</sup> which became law in 2018.<sup>12</sup> The Center for Safe Sport is somewhat limited in its authority since it is authorized to regulate US Olympic and ParaOlympic sports, but not university or professional sports.<sup>13</sup>

As of December 2019, the Center for Safe Sport had received over 4600 reports, roughly 230 per month.<sup>14</sup> Trained investigators consider and decide complaints, and sport governing bodies receive decisions at the same time as complainants in order to maintain fairness.<sup>15</sup> Safe sport training and education is mandated at the national and state level, but there is no funding for implementation which means increased costs for sport organizations.<sup>16</sup> Sport organizations are also required to publicly post the names of

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<sup>7</sup> Tribunal Arbitral du Sport/Court of Arbitration for Sport, online:<<https://www.tas-cas.org/en/index.html>>.

<sup>8</sup> European Union Sports Policy, online:<<https://ec.europa.eu/competition/sectors/sports/policy.html>>.

<sup>9</sup> Centre for Sport and Human Rights, online:<<https://www.sporhumanrights.org>>.

<sup>10</sup> US Center for Safe Sport, online: <<https://uscenterforsafesport.org>>.

<sup>11</sup> 36 USC § 101 (2018); *Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017*, Pub L No 115-126, 132 Stat 318.

<sup>12</sup> *Supra* note 10.

<sup>13</sup> *Ibid.*

<sup>14</sup> Kimberly Loushin & Mollie Bailey, “10 Takeaways From The USHJA SafeSport Presentation With Michael Henry” *Chronicle of the Horse* (12 Dec 2019),online: <<https://www.chronofhorse.com/article/10-takeaways-from-the-ushja-safesport-presentation-with-michael-henry>>.

<sup>15</sup> *Ibid.*

<sup>16</sup> Erin Prutow, “Where Are We With Safe Sport Regulations?” *Plaid Horse Magazine* ( 17 July 2019), online: <<https://www.theplaidhorse.com/2019/07/17/where-are-we-with-safe-sport-regulations/>>.

individuals who have been banned from their organizations.<sup>17</sup> These are huge advances for safe sport in the United States.<sup>18</sup>

These recent safe sport innovations, among others, are indications that international efforts are being made to recognize and protect the human rights of athletes. There is now extensive policy available to guide sport federations, and when conflicts emerge, there are authorities to turn to where sport law precedents and international and national standards will be applied.<sup>19</sup>

### **2.1.1 Should Sport Regulation be a Public or Private Matter?**

Sport organizations have long fought to keep regulation of sport disputes within the confines of their organizations. These efforts may have been driven by a sincere belief that an external authority or court would not have the necessary expertise required to resolve disputes as efficiently and effectively as the sport governing body, or they may have resulted from an attempt to hold onto power. In spite of resistance, legal regulation has expanded to cover many previously untouchable social relationships, and sport conflicts are one example.<sup>20</sup> Legislation is now involved in regulating many aspects of life once considered private, including marriage and childrearing, so the heightened involvement of law in sport is in keeping with a generally increased public interest in social relationships, and that interest has increased with the commercialization of sport.<sup>21</sup>

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

<sup>18</sup> Note: The biggest concern about the US Centre for Safe Sport, apart from its cost and the additional burdens on sport organizations, is that because it receives its authority from the USOC, some have raised questions about its independence.

<sup>19</sup> Gardiner, *supra* note 3 at 86.

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

<sup>21</sup> *Ibid* at 72.

Early sport associations, such as the World Rowing Federation (FISA),<sup>22</sup> the International Skating Union and the Fédération Internationale de Football Association (FIFA)<sup>23</sup> began to emerge in the late 1800s and early 1900s, creating their own regulations without significant government interest or involvement.<sup>24</sup> Today, however, sport plays a different role in society and governments are engaged in sport on many levels, including building stadiums, creating funding sources, bidding for sport television rights, hosting international sporting events, as well as regulating issues such as athlete doping and maltreatment.<sup>25</sup>

Foster recognizes that power struggles often happen when law enters the social sphere. He states that modern notions of public and private are changing however, as evidenced by:

...private areas increasingly being subject to public or judicial control, a move from voluntarism to legalism. But it [legal involvement] offers also a more complex version which stresses the interaction as legal norms are used to reorder the power relations within the social arena.<sup>26</sup>

Increased government and legal involvement in policy and sport dispute resolution often means loss of power and control by sport organizations. Proponents of sport self-regulation appreciate that maintaining internal regulatory control allows for informality, flexibility and accommodation, while potentially saving governments money.<sup>27</sup> They may

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<sup>22</sup> David Owen, "The Oldest International Sports Federation Celebrates its 125th Anniversary", *World Rowing* (25 June 2017) online: <<http://www.worldrowing.com/news/the-oldest-international-sports-federation-celebrates-its-125th-anniversary>>.

<sup>23</sup> International Association Football Federation, online:<<https://www.olympic.org/international-association-football-federation>>.

<sup>24</sup> Gardiner, *supra* note 3 at 89-90.

<sup>25</sup> *Ibid* at 89.

<sup>26</sup> Ken Foster, "Developments in Sporting Law" in I Allison, ed, *The Changing Politics of Sport* (Manchester: Manchester U Press, 1993) at 108.

<sup>27</sup> Gardiner, *supra* note 3 at 91-92.

also feel that rules created by individuals closely connected to the organization are more easily accepted because they will have been designed with inside knowledge, expertise and understanding. This usually makes them more likely to be both followed and enforced, while simultaneously making the process more efficient.<sup>28</sup>

Internal dispute resolution processes are usually less adversarial than judicial hearings, and this can be better for the future relationships of all parties involved.<sup>29</sup> Externally imposed regulations can often be met with resistance, consequently both the courts and sport federations have generally believed that sport conflicts were better handled by internal mechanisms.<sup>30</sup>

This view was confirmed by Lord Woolf CJ, who stated in the 2004 British case, *R v Barnes*,

[M]ost organized sports have their own disciplinary procedures for enforcing their particular rules and standards of conduct. As a result, in the majority of situations there is not only no need for criminal proceedings, it is undesirable for there to be criminal proceedings.<sup>31</sup>

For their part, Canadian sport organizations, like many national and international sport organizations, have historically supported the separation of sport and law and many have resisted any form of external interference or regulation.<sup>32</sup> Gardiner suggests that those within the sport world are concerned that the law could become the go-to dispute resolution mechanism for sport, thereby destroying the previously cited advantages of

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<sup>28</sup> J Black, *Rules and Regulators* (Oxford: Clarendon, 1997) at 103 & 219.

<sup>29</sup> Hilary A Findlay & Rachel Corbett, “The Rights of Athletes, Coaches and Participants in Sport” in Margery Holman, Dick Moriarty & Janice Forsyth, eds, *Sport, Fitness and the Law, 2nd Edition: North American Perspectives* ( Toronto: Canadian Scholars Press, 2001) at 21.

<sup>30</sup> Black, *supra* note 28 at 93.

<sup>31</sup> [2004] EWCA Crim 3246, per Lord Woolf CJ at para 5.

<sup>32</sup> Gretchen Kerr, Ashley Stirling & Ellen MacPherson “A Critical Examination of Child Protection Initiatives in Sport Contexts” (2014) 3:4 Soc Sci 742 at 751.

expertise, engagement, efficiency and internal buy-in.<sup>33</sup> Practically speaking however, the impact of increased legal regulation in sport would primarily involve the introduction of policy-driven standards and regulation rather than judicial interference in sport matters. This increased external oversight and objectivity would ideally lead to the removal of bias and elimination of protocol failures while promoting more effective governance.<sup>34</sup>

The question is therefore, whether sport is ethically improved when external guidance is added to existing internal sport governance, or whether legal and political engagement most often represent uninformed, unnecessary, time-consuming interference.<sup>35</sup> External involvement can be particularly problematic when it results from political motives,<sup>36</sup> or when decisions require technical expertise, perhaps relating to a highly-specialized or rapidly-changing sport. In the latter case, courts, and governments may lack the specific knowledge required to make informed decisions.<sup>37</sup>

In the mid to late twentieth century, courts were infrequently involved in sporting matters, and when they were, it was primarily at the level of judicial review of disciplinary hearings, or to address conflicts in contractual employment.<sup>38</sup> Now, as then, courts do not hear appeals on the content or fairness of sport authority decisions, but rather, they examine whether the sport authority had the capacity to make the decision in the first place and whether the process was fair, ethical, and followed the organization's regulations and code of conduct.<sup>39</sup>

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<sup>33</sup> Gardiner, *supra* note 3 at 74.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid* 71 at 86; Lone Friis Thing & Laila Ottesen, "The Autonomy of Sports: Negotiating Boundaries Between Sports Governance and Government Policy in the Danish Welfare State" (2010) 2:2 Int J Sport Policy & Politics at 223.

<sup>36</sup> Gardiner, *supra* note 3 at 75-76.

<sup>37</sup> R Baldwin & M Cave, *Understanding Regulation : Theory Strategy and Practice* (1999) (Oxford: OUP, 1999) at 80; Foster, *supra* note 26 at 90; Gardiner, *supra* note 3 at 91.

<sup>38</sup> Gardiner, *supra* note 3 at 89 and 93.

<sup>39</sup> *Ibid* at 93.

Sport authorities have seen government interests expand to include a wide range of sport-related activities, ranging from the commercial aspects of sporting events and the management of facilities, to employment contracts with athletes, coaches and staff, policies regulating drug use and athlete maltreatment, as well as matters relating to sponsorship, safety, corruption, cheating, and on-field athlete interactions. The courts have needed to expand their reach into these same areas for purposes of sport dispute resolution.<sup>40</sup>

The globalization, professionalization and commercialization of sport is directly associated with increased legal involvement because more individuals, governments and corporations now have a vested interest in conflict outcomes and there is significantly more at stake for all parties.<sup>41</sup> Commercialization may also lead to increased focus on funding and sponsorship, prioritizing medals over athlete wellbeing, and the potential for bias when sport authorities address conflict resolution internally.<sup>42</sup> The historic practice and widespread acceptance of hegemonic masculinity in sport may further contribute to abuses of power and the lack of fair and impartial conflict resolution.<sup>43</sup> Abuses of this nature have meant that courts are increasingly used to decide disputes, penalize perpetrators and remedy victims of sport-related conflict.<sup>44</sup>

“Moral panic” has also been associated with increased legalization and government involvement in sport.<sup>45</sup> Moral panic is a term used to describe the social alarm that can be created by sensational, and not always accurate or responsible, media stories.<sup>46</sup> Response to such stories can sometimes create pressure for government officials to take immediate

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<sup>40</sup> *Ibid* at 89.

<sup>41</sup> *Ibid* at 86 and 89; Paulo David, *Human Rights in Youth Sport: A Critical Review of Children’s Rights in Competitive Sports* (London: Routledge, 2005) at 16.

<sup>42</sup> Kerr, *supra* note 32 at 752.

<sup>43</sup> Ceila Brackenridge, *Spoilsports: Understanding and Preventing Sexual Exploitation in Sport* (London: Routledge, 2001) at 82.

<sup>44</sup> Gardiner, *supra* note 3 at 86.

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

<sup>46</sup> Brackenridge, *supra* note 43 at 20-21.



political action, which creates a rush to impose regulation for the safety and protection of the public.<sup>47</sup> Unfortunately, quick fixes of this kind often prove to be ineffective, as they are not always supported by academic research, nor based in evidence.<sup>48</sup>

Canadian sport organizations, also called federations or associations, are quasi-public in nature; that is, they receive public funds and are thus subject to a certain amount of government regulation.<sup>49</sup> This is true for most Western countries and this government dependence means that sport federations in these countries must act consistently with principles of fairness and democracy. Governments may impose regulations that are deemed to be in the public interest and courts are increasingly being used to resolve sport-related disputes when there is believed to have been negligence, abuse of power, or criminal behaviour.<sup>50</sup>

In addition to federal government involvement, national sport authorities may also be subject to international sport policy directives from international federations.<sup>51</sup>

International sport regulatory bodies such as: the International Olympic Committee (IOC), the Fédération Internationale de Football Association (FIFA), and the International Association of Athletics Federations (IAAF) have tremendous power over their affiliated sports. This exercise of power can have an impact not just at the international level, but it can sometimes extend to national and local regulation.<sup>52</sup>

International sport federations are able to impose global regulations on their sports, particularly when dealing with countries possessing less wealth and power.<sup>53</sup>

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<sup>47</sup> *Ibid*; Gardiner, *supra* note 3 at 86.

<sup>48</sup> Brackenridge, *supra* note 7 at 43 at 63.

<sup>49</sup> Foster, *supra* note 26 at 90.

<sup>50</sup> *Ibid* at 93.

<sup>51</sup> Gardiner, *supra* note 3 at 77.

<sup>52</sup> *Ibid* at 79.

<sup>53</sup> *Ibid*.

There can also be a converse effect, which has been described as “mutual interpenetration”,<sup>54</sup> whereby the most influential sporting countries have sometimes successfully imposed regulations on an international federation.<sup>55</sup> A sport federation may be so powerful that it is capable of negotiating with international authorities, as happened when FIFA bargained with the European Union regarding FIFA’s policy and control over the football transfer system.<sup>56</sup> This raises the question as to what real protections exist for individuals against powerful international sport federations.<sup>57</sup>

Weatherill asks whether international sport federations should be recognized as independent systems and thus protected from legal interference, or whether international sport federations should be subject to national and international legal principles.<sup>58</sup> In light of the growing commercialization of sport, it would seem that total regulatory independence for sport federations has become an impossibility.<sup>59</sup> It is also unreasonable to expect that federations will be sufficiently motivated by principles such as the greater good or the pursuit of athlete wellbeing, and so, the existence of law, or the threat of law, would seem to be necessary.<sup>60</sup>

### **2.1.2 Global Sports Law and International Sports Law**

The terms “global sports law” and “international sports law” are sometimes used interchangeably, however global sports law, also known as *lex sportiva*, specifically refers to the body of sport law produced by the Swiss Court of Arbitration for Sport

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<sup>54</sup> M Ougaard, “Approaching the Global Polity”, Working Paper No 42/99, Centre for the Study of Globalisation and Regionalisation, at 14, online:<[www.csgr.org](http://www.csgr.org)>.

<sup>55</sup> Gardiner, *supra* note 3 at 79-80.

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

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

<sup>58</sup> S Weatherill, “After Bosman: Tracking a Sporting Revolution”, *Sportzaken* (October 1999) at 75-80.

<sup>59</sup> Gardiner, *supra* note 3 at 71.

<sup>60</sup> *Ibid.*

(CAS).<sup>61</sup> The latter term, international sports law, indicates international legal sport and human rights precedents which apply to countries involved in sport.

Sports law evolved as an international discipline in the 1970s when social and political interests began overlapping with sport.<sup>62</sup> International sports law protects the democratic principles of “freedom, fairness, equality, safety and economic security” for sport stakeholders.<sup>63</sup> These principles have primarily been embraced by democratic countries that also recognize individual freedoms, the right to free speech as well as gender and religious equality, consequently, it may not always be a simple matter for international sport authorities, and humanitarian organizations, to impose these principles on countries whose governments may operate under differing philosophies.<sup>64</sup>

### **2.1.3 The Swiss Court of Arbitration for Sport (CAS)**

The Swiss Court of Arbitration for Sport (CAS) was created by the International Olympic Committee (IOC) and international sport federations, and founded in 1983. It is based in Lausanne Switzerland. The CAS addresses legal conflicts involving, and reviews the decisions of, national and international sport governing bodies.<sup>65</sup> The CAS is building a body of international sport law, *lex sportiva*, that has been compared to *lex mercatoria*, the body of arbitration law governing private commercial transactions.<sup>66</sup>

The creation of the CAS is considered by some to be an attempt to preserve the independence of the IOC, and the international sport federations, and shield them from

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<sup>61</sup> Foster, *supra* note 26 at 90.

<sup>62</sup> Barnes, *supra* note 1 at 2-3.

<sup>63</sup> *Ibid.*

<sup>64</sup> Gardiner, *supra* note 3 at 86.

<sup>65</sup> Despina Mavromati, "The Role of the Swiss Federal Tribunal and Its Impact on the Court of Arbitration for Sport (CAS)" (September 29, 2016), online: (pdf) SSRN <<https://ssrn.com/abstract=2845237>>.

<sup>66</sup> Matthew J Mitten & Hayden Opie, “‘Sports Law’: Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution” (2010) 85:2 Tulane L Rev 269; A Lewis A & J Taylor, eds, *Sport: Law and Practice* (London: Butterworth, 2003) at preface.

law.<sup>67</sup> International sport federations are only subject to regulation by the CAS, the same court which they created.<sup>68</sup> Critics of the CAS question its impartiality and they believe the body's reach is limited.<sup>69</sup> Since laws of the CAS are based on a few hundred decisions, covering limited subjects and produced over a short period of time, it has been suggested that "...it is more of a *lex ferenda* (future law) than a mature *lex specialis*."<sup>70</sup>

Until 1994, the CAS was financially dependent on the IOC, and CAS judicial nominations came directly from the IOC.<sup>71</sup> Further, it has been claimed that a lack of transparency and expertise, particularly when addressing human rights abuses, could leave victims without proper remedy.<sup>72</sup> Insufficient impartiality is a challenge that seems to arise at all levels of sport dispute resolution. Without true independence it is impossible for sport regulatory authorities to maintain objectivity, or the impression of objectivity, in investigations, disciplinary proceedings, and the provision of remedies.

## 2.2 International Conventions and Other Instruments

While the international sport federations, and the CAS, may be coming up short with respect to the enforcement of human rights protections, numerous human rights and child rights conventions<sup>73</sup> have successfully created international awareness and established important standards regarding athletes' rights. Since the reputation of sport has always been that it promotes good health and positive social relationships,<sup>74</sup> human rights abuses

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<sup>67</sup> David, *supra* note 41 at 25; Foster, *supra* note 26 at 3.

<sup>68</sup> Gardiner, *supra* note 3 at 81.

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

<sup>70</sup> *Ibid* at 82.

<sup>71</sup> David, *supra* note 41 at 26.

<sup>72</sup> Daniela Heerdt, "Tapping the Potential of Human Rights Provisions in Mega-Sporting Events' Bidding and Hosting Agreements" (2018) 17 Int Sports Law J 185.

<sup>73</sup> UN *Universal Declaration of Human Rights*, Resolution 217 A (III), New York (1948), online: <<http://www.unhchr.ch/udhr/index.htm>>; UN, *Convention on the Rights of the Child*, Resolution 44/25, New York (1989), online: <<http://www.unhchr.ch/html/menu2/6/crc/treaties/crc.htm>>; UN, *Declaration on the Rights of the Child*, Resolution 1386 (xiv), (1959); UN Committee on Rights of the Child, *Report of the Committee on the Rights of the Child to the General Assembly*, A/57/41, New York (2002).

<sup>74</sup> David, *supra* note 41 at 26.

in sport did not gain public attention until the 1970s, when Marty Ralbovsky questioned the increasingly young ages of elite athletes, as well as the values and methods of some coaches.<sup>75</sup>

Extensive human rights abuses in sport were later uncovered in the sport practices employed by the USSR and other Eastern European countries in the 1970s,<sup>76</sup> whereby athletically gifted children were taken from their families and subjected to forced doping schemes as well as physical, psychological and sometimes sexual maltreatment.<sup>77</sup> East German doctors responsible for abuses of this nature were eventually convicted of causing bodily harm to athletes through imposed doping, and a compensation system was created for victims.<sup>78</sup>

Unfortunately sport human rights abuses have continued unabated, in spite of criminal convictions, and the enactment of numerous international human rights treaties. These treaties establish basic protections for the rights of individuals and when those rights are breached, the treaties may help create access to a fair and impartial hearing.<sup>79</sup> Canada has ratified seven of the nine key international human rights treaties.<sup>80</sup>

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<sup>75</sup> Marty Ralbovsky, *Lords of the Locker Room: The American Way of Coaching and Its Effect on Youth* (New York: Peter H Wyden, 1974); David, *supra* note 41 at 17.

<sup>76</sup> J Riordan, *Soviet Sport*, (Oxford: Basil Blackwell, 1980).

<sup>77</sup> S Ungerleider, *Faust's Gold: Inside the East German Doping Machine* (New York: St Martin Press, 2001).

<sup>78</sup> U Haas-Wiss & M Holla, "Staatliche Rechtsgrundlagen: Das dopingopferhilfsgesetz" (Domestic Legal Provisions: The Law on Assistance to Victims of Doping), (2003) Nationale Agentur (National Anti-Doping Agency).

<sup>79</sup> *Ibid.*

<sup>80</sup> UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: <https://www.refworld.org/docid/3ae6b3940.html> [accessed 31 July 2020]; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html> [accessed 31 July 2020]; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at:

The *1978 UNESCO International Charter of Physical Education and Sport*<sup>81</sup> was an early United Nations effort to provide international protections in sport. It offered little maltreatment protection for athletes however, making only one reference to athlete wellbeing.<sup>82</sup> This reference appeared in article 7.3, which states: “It is important that all sports authorities and sportsmen and women be conscious of the risks to athletes and more especially to children, of precocious and inappropriate training and psychological pressures of every kind.”<sup>83</sup> The United Nations Educational, Scientific and Cultural Organization (UNESCO) and United Nations Office for Sport Development (UNOSDP) proposals of 2003<sup>84</sup> were considerably more progressive, particularly in their emphasis on the right for athletes to participate in the sport decision making process.<sup>85</sup>

Since the 1970s there have been a host of other human rights related conventions which were often not specifically about sport, but which may nonetheless have relevance for the prevention of maltreatment in sport. Many countries, including Canada, enacted national

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<https://www.refworld.org/docid/3ae6b36c0.html> [accessed 31 July 2020]; UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: <https://www.refworld.org/docid/3ae6b3970.html> [accessed 31 July 2020]; UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <https://www.refworld.org/docid/3ae6b3a94.html> [accessed 31 July 2020]; UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html> [accessed 31 July 2020]; UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex I, available at: <https://www.refworld.org/docid/4680cd212.html> [accessed 31 July 2020]; Human Rights Treaties, Government of Canada (25 January 2019), online: <<https://www.canada.ca/en/canadian-heritage/services/canada-united-nations-system/treaties.html>>.

<sup>81</sup> *UNESCO International Charter of Physical Education and Sport*, 21 November 1978, online: <<https://unesdoc.unesco.org/ark:/48223/pf0000216489>>.

<sup>82</sup> James AR Nafziger & Stephen F Ross, *Handbook on International Sports Law* (Cheltenham, UK: Edward Elgar, 2011) at 304; *Ibid.*

<sup>83</sup> *Supra* note 80.

<sup>84</sup> *Ibid.*

<sup>85</sup> Note: In 1976, the American Alliance for Health, Physical Education and Recreation, showed a visionary effort, creating a policy for the protection of young athletes. The bill also showed foresight in emphasizing the right for athletes to participate in the sport decision making process. It listed the right to trained leadership, the right to a safe and healthy environment, and the right to take part in sport at the appropriate level, among other components of its “Bill of Rights for Young Athletes”. See David, *supra* note 41 at 240; R Martens & V Seefeldt, eds, *Guidelines for Children’s Sports* (Reston, VA: AAHPERD, 1979) at 15.

and provincial<sup>86</sup> child protection legislation, perhaps spurred on by the widespread signing of the *United Nations Convention on the Rights of the Child (CRC)*, which was introduced in 1989.<sup>87</sup>

The *CRC* recognizes the vulnerability of children, and that this inherent characteristic entitles them to protection.<sup>88</sup> Signatories to the *CRC* commit to protect the children in their countries from the harms listed in the convention.<sup>89</sup> The *CRC* is perhaps most significant in that it introduced the idea that children are individuals with inherent rights, rather than primarily focusing on their vulnerability and need for protection. It also recognized the right for children to express their views,<sup>90</sup> and emphasized the importance of taking a holistic interpretation approach when reading the convention.<sup>91</sup>

The *CRC* has been successfully ratified by 196 nations (notably excluding the United States) making it more widely endorsed than any other convention in history.<sup>92</sup>

Canada ratified the convention in 1991, also later ratifying two optional protocols, the *Involvement of Children in Armed Conflict*, and on the *Sale of Children, Child Prostitution and Child Pornography*.<sup>93</sup> Canada has not ratified the third protocol on a communications procedure, which would entitle complainants to bring their concerns

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<sup>86</sup> Note: Each Canadian province and territory has its own child protection legislation.

<sup>87</sup> *Supra* note 80; Nafziger, *supra* note 82 at 303.

<sup>88</sup> Jean-François Noël, “The Convention on the Rights of the Child” (2015), online: [h<tps://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/crc-crde/conv2a.html>](https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/crc-crde/conv2a.html).

<sup>89</sup> Peter Donnelly, “Child Labour, Sport Labour: Applying Child Labour Laws to Sport” (1997) 32:4 *Int Rev Soc Sport* 389 at 390.

<sup>90</sup> *Supra* note 80, Article 12; David, *supra* note 41 at 20.

<sup>91</sup> David, *supra* note 41 at 22.

<sup>92</sup> Ben Mathews, *New International Frontiers in Child Sexual Abuse: Theory, Problem and Progress* (Cham, Switzerland: Springer, 2019) at 122.

<sup>93</sup> Department of Justice, Government of Canada, “International Human Rights Treaties to which Canada is a Party”, online: [h<tps://www.justice.gc.ca/eng/abt-apd/icg-gci/ihr1-didp/tcp.html>](https://www.justice.gc.ca/eng/abt-apd/icg-gci/ihr1-didp/tcp.html).

directly to the UN Committee on the Rights of the Child when other channels have proven inadequate.<sup>94</sup>

The *CRC* has had significant international impact on sport maltreatment issues, even though sport is not specifically addressed in the convention, and the *CRC* has not been officially enacted as law in Canada. The *CRC* has many applications for sport, however. For example, Article 31 provides for the protection of rights relating to cultural, artistic, recreational and leisure activity. Article 28 and 29 state the right to education, and the right to achieve one's full potential.

Article 24 declares the right to health, which includes: protection from abuse and neglect, the protection of mental health, injury prevention, and freedom from bullying. Article 31 states there is a right to play, that is, to have free time without structure, and 31.1 establishes the right to rest. Article 19 protects children from violence and maltreatment, while Article 11 prohibits trafficking of children (which has been a significant problem in sports such as football and camel racing).<sup>95</sup> Sport is also recognized as a potential tool to support the *CRC* mission, which includes: promoting physical and emotional health and wellbeing, acceptance of race, gender, disabilities, religious and economic differences.<sup>96</sup>

In 2003, the UN Committee on the Rights of the Child examined Canada's implementation of the *CRC*. They recommended that the Canadian federal government work with the provinces to achieve the goals of the *CRC*. They expressed concern that Canada does not provide sufficient childcare assistance and they recommended a

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<sup>94</sup> Cheryl Milne, "Optional Protocol to the United Nations Convention on the Rights of the Child with Regard to Communications Procedure" (15 June 2018) Canadian Bar Association, online: <<https://www.cba.org/CMSPages/GetFile.aspx?guid=40482b8d-53ae-4dca-801b-bde621442c7c>>.

<sup>95</sup> *Supra* note 80; Donnelly, *supra* note 89.

<sup>96</sup> *CRC*, *supra* note 80.



prohibition on corporal punishment of children.<sup>97</sup> None of these recommendations has been acted upon.<sup>98</sup>

A 2006 survey revealed that Canadians have little understanding of child rights.<sup>99</sup> Survey respondents were mostly unfamiliar with the *CRC*, and 75% of Canadian youth respondents said they did not know how to access their rights.<sup>100</sup> In 2011, the Canadian Coalition for the Rights of Children (CCRC) produced a report to assist the government with implementation of the *CRC*.

The report of the CCRC, and its stakeholders, made the following recommendations with respect to sport. Provincial governments should work with sport organizations to develop minimum standards of safety and freedom from violence in sport. A national strategy involving cooperation between the federal government, law enforcement and sport organizations would send an important message that the Canadian government is serious about sport violence. This could also help to end harmful public misperceptions that violence and bullying in sport are normal behaviour, and it could help to change the idea that sport violence is usually perpetrated by athletes.<sup>101</sup>

The CCRC report recommends that more effort should be made to incorporate *CRC* protections, both federally and provincially, and that the *CRC* should be made into Canadian law. They add that since the *Canadian Charter of Rights and Freedoms (the Charter)*<sup>102</sup> was written before the *CRC*, the *Charter* does not provide specific

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<sup>97</sup> “Children’s Rights: Canada”(2007) Library of Congress, Canada, at para 22, online: <<https://www.loc.gov/law/help/child-rights/canada.php>>. Note: This will be discussed further in Chapter Six; *Supra*, note 90.

<sup>98</sup> Canadian Coalition for the Rights of Children, “Children’s Rights: Right In Principle, Right In Practice” (2012), online: <<http://rightsofchildren.ca/wp-content/uploads/2016/01/CCRC-report-on-rights-of-children-in-Canada.pdf>>.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> CCRC, *supra* note 98 at 31.

<sup>102</sup> *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UL), 1982, c11.

consideration for the rights of children and thus Canadian children are constitutionally invisible.<sup>103</sup>

Signing of an international convention indicates a nation's support for, and an intention to ratify, the convention. Once ratified, a UN monitoring system may help signatories to implement the convention, however, human rights conventions do not have enforcement provisions and any commitment to fulfill the convention must come from the countries themselves.<sup>104</sup>

International conventions, such as the *CRC*, are non-legally binding until ratified, and in some countries, like Canada, after ratification, the ratified convention must additionally be enacted into legislation to have the force of law.<sup>105</sup> Canada has not taken this legislative step and has received criticism for this from organizations like the CCRC.<sup>106</sup>

Canadian constitutional law prevents the federal government from enacting legislation purporting to regulate areas that fall under provincial jurisdiction, even in the case of international agreements. In such cases, such as in signing and ratifying the *CRC*, Canada includes a reservation that federal compliance will require provincial cooperation.<sup>107</sup> In Canada the provinces maintain jurisdiction over most matters pertaining to labour and sport. There is federal and provincial overlap in the areas of education and healthcare, while criminal matters fall exclusively under federal jurisdiction. All of these subjects are addressed by the *CRC* and they all have an impact on athlete maltreatment.

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

<sup>104</sup> *Ibid.*

<sup>105</sup> Nafziger, *supra* note 82 at 303; United Nations, Department of Economic and Social Affairs, online: <<https://www.un.org/esa/socdev/enable/convinfofaq.htm>>; Department of Justice, "Convention on the Rights of the Child, online: <<https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/crc-crde/conv2d.html#ftn11>>.

<sup>106</sup> CCRC, *supra* note 98.

<sup>107</sup> *Supra* note 97.

While international human rights acts such as, *CRC*,<sup>108</sup> the *UN Universal Declaration of Human Rights, 1948*,<sup>109</sup> the *UK Human Rights Act 1998*,<sup>110</sup> and the *European Union Charter of Fundamental Rights, 2000*,<sup>111</sup> do not bind the decisions of sport governing bodies, they do influence decision-makers and the decision making process.<sup>112</sup> Similarly, sport-related UN General Assembly resolutions,<sup>113</sup> though not legally binding, may provide guidance and influence sport federations in their interpretations and decision making.<sup>114</sup>

Sport governing bodies are also subject to a “horizontal effect”<sup>115</sup> from international human rights legislation. This means that although they are not directly liable for compliance, because they are not countries nor signatories, it is the responsibility of each country to make sure that the entities governed by them, like sport governing bodies, are meeting their human rights obligations.<sup>116</sup> This is particularly true with respect to elements of natural justice, such as the right to a fair hearing, the right to privacy, and freedom of expression.<sup>117</sup>

When the British Boxing Board heard a case against American World Champion boxer, Mike Tyson, in 2016, Tyson’s lawyer suggested that if the matter was brought before the European Human Rights Commission (EHRC), Tyson would receive protection under Article 10

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<sup>108</sup> *CRC*, *supra* note 71.

<sup>109</sup> *Ibid.*

<sup>110</sup> *United Kingdom: Human Rights Act 1998* [United Kingdom of Great Britain and Northern Ireland], 9 November 1998, online: <<https://www.refworld.org/docid/3ae6b5a7a.html>>.

<sup>111</sup> *European Union Charter of Fundamental Rights (2000)*, online: <[https://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](https://www.europarl.europa.eu/charter/pdf/text_en.pdf)>.

<sup>112</sup> Gardiner, *supra* note 3 at 137.

<sup>113</sup> UN General Assembly Resolutions 58/5 (3 November 2003); 59/10 (27 October 2004); 60/1 (16 September 2005); 61/10 (3 November 2006); 62/271 (23 November 2008); 65/4 (23 November 2010).

<sup>114</sup> Alessandra Teixeira, “Human Rights Based Approach to Grassroots Sports and Physical Activities”, International Sports and Culture Association (2012), online: <[https://www.academia.edu/download/50722923/HRBA\\_\\_\\_Sports\\_Report\\_-2.pdf](https://www.academia.edu/download/50722923/HRBA___Sports_Report_-2.pdf)>.

<sup>115</sup> David, *supra* note 41 at 27.

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

<sup>117</sup> Gardiner, *supra* note 3 at 137; David, *supra* note 41 at 27.

of the *European Convention on Human Rights*, which guarantees the right to free speech. Since the EHRC decided in his favour, it is believed that this “threat” from his lawyer influenced the outcome of the decision.<sup>118</sup> Whereas historically the courts had stayed away from sport conflicts, primarily engaging only for judicial review or in matters of contract law, international and national human rights legislation have raised awareness regarding human rights concepts so that these principles are now influencing the outcomes of administrative sport hearings, such as in the Tyson case above.<sup>119</sup>

In 2003, the United Nations Educational, Scientific and Cultural Organization (UNESCO) created a visionary statement on the rights of athletes which included the following statement:<sup>120</sup>

The protection of young athletes should be understood in the perspective of the principles stated in the UN Convention on the Rights of the Child. That is why protection should not be understood solely in terms of health as well as physical and psychological integrity. It also involves quality education that facilitates long-term personal and professional development. To this end, flexible modalities of educational provisions should be provided which meet the educational needs of young athletes. Protection also includes safeguarding against such dangers as child labour, violence, doping, early specialization, over-training, and exploitative forms of commercialization as well as less visible threats and deprivations, such as the premature severance

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<sup>118</sup> “Tyson Fury: British Boxing Board of Control Suspends Fighter” *BBC Sport* (3 October 2016), online: <<https://www.bbc.com/sport/boxing/37641280>>.

<sup>119</sup> Gardiner, *supra* note 3 at 137.

<sup>120</sup> David, *supra* note 41 at 246.

of family bonds and the loss of sporting, social and cultural ties.<sup>121</sup>

Further progress came in 2007 when the United Nations Children’s Fund (UNICEF) identified sport as representing a gap in their child protection efforts,<sup>122</sup> and they created a plan to spread awareness, implement standards, promote research and data collection, and protect young athletes around the world from maltreatment.<sup>123</sup> UNICEF’s “International Standards for Safeguarding and Protecting Children in Sport”, followed soon thereafter in 2012, providing standards for safe sport initiatives which served to enhance UNICEF’s international development and humanitarian missions.<sup>124</sup>

Furthermore, the *International Olympic Charter (IOC)*<sup>125</sup> has taken the step of addressing maltreatment issues, by providing humanitarian principles intended to guide the conduct of international athletes and sport stakeholders involved in international sports competition,<sup>126</sup> as well as recently including human rights clauses in all contracts with future Olympic Games hosts.<sup>127</sup> The Council of Europe developed a 1992 *European Sports Charter*, and an associated, Code of Sports Ethics.<sup>128</sup> UNESCO developed an

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<sup>121</sup> UN Educational, Social and Cultural Organization (UNESCO) (2003) Final Communiqué of the Round Table of Ministers and Senior Officials Responsible for Physical Education and Sport (Paris: UNESCO, 10 January 2003).

<sup>122</sup> Ceila Brackenridge & Daniel Rhind, “Child Protection in Sport: Reflections on Thirty Years of Science and Activism” (2014) 3 J Social Sciences 326 at 331.

<sup>123</sup> Celia Brackenridge et al, “Protecting Children from Violence in Sport: A Review With a Focus on Industrialized Countries” (2010) Unicef Innocenti Research Centre, online: < [https://www.unicef-irc.org/publications/pdf/violence\\_in\\_sport.pdf](https://www.unicef-irc.org/publications/pdf/violence_in_sport.pdf)>.

<sup>124</sup> Stephen Reynard, “Child Safeguarding at the 2013 Beyond Sport Summit” (16 September 2013), online: <<https://www.beyondsport.org/about-us/about-us-partners/unicef/>>; Brackenridge, *supra* note 122 at 331.

<sup>125</sup> *International Olympic Charter*, online: <<https://www.olympic.org/documents/olympic-charter>>; International Olympic Committee, “Consensus Statement on Sexual Harassment and Abuse” (8 February 2007), online: <<http://www.olympic.org/medical-commission?tab=statements>>.

<sup>126</sup> *tab=statements*.

<sup>127</sup> Nafzinger, *supra* note 82 at 2.

<sup>128</sup> Council of Europe, *European Sports Charter* (1992), online: <<https://www.coe.int/en/web/sport/european-sports-charter>>.

*International Charter of Physical Education, Physical Activity and Sport*, in 2015.<sup>129</sup> The Fédération Internationale de Football Association (FIFA) and Union of European Football Associations (UEFA) both recently added human rights requirements to event bidding and hosting agreements.<sup>130</sup>

Needless to say, the number of international and national organizations creating humanitarian guidance for the protection of athletes has become somewhat overwhelming.<sup>131</sup> Due to the number of humanitarian policies, and the breadth of their underlying organizational missions, humanitarian goals may not always be the ones to take precedence however. This may be a particular problem if, for example, the primary organizational mission comes into direct conflict with the humanitarian safe sport mission.<sup>132</sup>

Organizations may also find themselves in disagreement with one another if, although united in a safe sport mission, their expertise, focus or sensitivities make it challenging to work together for a common goal.<sup>133</sup> Brackenridge suggests the solution to the issue of conflicting missions is to encourage communication, negotiation and the creation of effective “cross-sector partnerships” between government, business and non-government organizations.<sup>134</sup>

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<sup>129</sup> UNESCO, *International Charter of Physical Education, Physical Activity and Sport* (17 November 2015), online: <<https://unesdoc.unesco.org/ark:/48223/pf0000235409>>.

<sup>130</sup> Heerdt, *supra* note 72.

<sup>131</sup> Republic of Korea: National Human Rights Commission of the Republic of Korea, *Guidelines: Human Rights in Sports* (Seoul: NHRC, 2011); UK Child Protection in Sport Unit, “Sports Safeguarding Children Initiative: Mid-project Progress Report” 2013, online: <<https://thecpsu.org.uk/news/2013/october/sports-safeguarding-children-initiative-report/>>; Committee for the Development of Sport, “Sexual Harassment and Abuse in Sport Especially the Case of Women, Children and Youth”, Resolution 3/2000, Secretary General’s Report of the 9th Conference of Ministers Responsible for Sport, Bratislava, Slovakia (30-31 May 2000), online: <[http://www.coe.int/t/dg4/sport/resources/texts/spres00.3\\_en.asp](http://www.coe.int/t/dg4/sport/resources/texts/spres00.3_en.asp)>.

<sup>132</sup> Brackenridge, *supra* note 122 at 332.

<sup>133</sup> *Ibid.*

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

These collaborations will be essential considering the varied missions of safe sport stakeholders, and because true inroads are never made through the creation of policy alone. Collaborations are enhanced when there is a shared vision. One of the most important visions and significant ideological developments in recent safe sport conventions is the movement away from paternalistic and rules-based strategies to a holistic emphasis on athlete empowerment and a focus on the rights, opinions and wellbeing of all athletes.<sup>135</sup>

### **2.3 Canadian Legislation, Declarations and Policy**

Unlike the United States, Canada does not have a national sport regulatory authority nor any specific legislation banning athlete maltreatment. Conflicts in Canadian sport are dealt with primarily by using internal dispute mechanisms. When those measures are inadequate, parties may resort to statutes that may provide protections via various legislation including: the *Criminal Code*, Canadian provincial human rights legislation, product liability, environmental protection, worker's compensation, employment standards, occupational health and safety, as well as through tort, negligence and contract laws.<sup>136</sup>

In 2019, the Canadian independent sport body, Canadian Centre for Ethics in Sport (CCES), after extensive consultation with experts and stakeholders, produced a *Universal Code of Conduct to Prevent and Address Maltreatment in Sport (UCCMS)*.<sup>137</sup> All Canadian sport organizations receiving federal funds must endorse this new Canadian code of conduct and integrate the directives into their sport policy.<sup>138</sup> The *UCCMS* was

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<sup>135</sup> Brackenridge, *supra* note 122 at 330; Celia Brackenridge, Tess Kay & Daniel Rhind, eds, *Sport, Children's Rights and Violence Prevention : A Sourcebook on Global Issues and Local Programmes* (London: Brunel University Press, 2012).

<sup>136</sup> *Canadian Human Rights Act*, RSC, 1985, c. H-6, online: <<https://laws-lois.justice.gc.ca/eng/acts/h-6/>>; Findlay, *supra* note 29 at 3.

<sup>137</sup> *Universal Code of Conduct to Prevent and Address Maltreatment in Sport (UCCMS)*, Version 5.1 online: <[https://abuse-free-sport.ca/universal-code-of-conduct/https://mcusercontent.com/95de45c23ac490c5d391e924f/files/7cc4ba0b-7565-43bf-aa4c-c5be146e7d97/UCCMS\\_v5.1\\_FINAL\\_Eng.pdf](https://abuse-free-sport.ca/universal-code-of-conduct/https://mcusercontent.com/95de45c23ac490c5d391e924f/files/7cc4ba0b-7565-43bf-aa4c-c5be146e7d97/UCCMS_v5.1_FINAL_Eng.pdf)>.

<sup>138</sup> *Ibid.*

an important result of the Canadian minister for science and sport's Red Deer Declaration for the Prevention of Abuse, Harassment and Discrimination in Sport.<sup>139</sup> The Red Deer Declaration also expressed a commitment, signed by the federal, provincial and territorial governments, to end abuse and harassment in Canadian sport. In spite of the promise of the *UCCMS*, the Red Deer Declaration was a disappointment for athletes and academics who had long been requesting the creation of an independent Canadian safe sport authority.<sup>140</sup>

The Red Deer Declaration was the federal government's response to public outcry after the CBC revealed research results that over 200 Canadian coaches had been convicted of sexual abuse of athletes, under the age of majority, in the last twenty years.<sup>141</sup> Although the Red Deer Declaration did little more than publicly state the government's commitment to safe sport, the resulting *UCCMS* could benefit Canadian athletes by increasing awareness of athlete maltreatment and providing an important tool to help prevent and address maltreatment issues. In another positive development, the minister of science and sport committed federal funds for a toll-free helpline, and an "independent" investigation unit<sup>142</sup> as well as a gender equity secretariat for sport.<sup>143</sup>

Such initiatives sound like they are a step in the right direction, however the minister came under immediate fire from Canadian academics and athletes following the Red

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<sup>139</sup> Conference of Federal-Provincial-Territorial Ministers Responsible for Sport, Physical Activity and Recreation, Red Deer Declaration for the Prevention of Abuse, Harassment and Discrimination in Sport, 14-15 February 2019, Red Deer, Alberta, online: <<https://scics.ca/en/product-produit/red-deer-declaration-for-the-prevention-of-harassment-abuse-and-discrimination-in-sport/>>.

<sup>140</sup> *Ibid.*

<sup>141</sup> Gemma Karstens-Smith, "Ottawa, Provinces Commit to Addressing Abuse in Sports" *Canadian Press*, (15 Feb 15, 2019).

<sup>142</sup> Canadian Heritage, Government of Canada, "Safe Sport: Gender Equity Announcement" (March 14, 2019), online:<<https://www.canada.ca/en/canadian-heritage/news/2019/03/safe-sport-gender-equity-announcement.html>>.

<sup>143</sup> Canadian Heritage, Government of Canada, "Creating a Nationwide Code of Conduct and a New Gender Equity Secretariat are Next Steps to Eliminating Abuse, Discrimination and Harassment in Sport" (February 21, 2019), online:<<https://www.canada.ca/en/canadian-heritage/news/2019/02/creating-a-nationwide-code-of-conduct-and-a-new-gender-equity-secretariat-are-next-steps-to-eliminating-abuse-discrimination-and-harassment-in-sport.html>>.



Deer Declaration. For these stakeholders, the most pressing issue is still the creation of a truly independent authority, and so long as an investigation unit or helpline are reporting back to the national sport federations, or if sanctions are coming from the federations, there is no true separation or independence for these athlete protection measures.<sup>144</sup>

Academics, such as Kerr, Kidd and Donnelly, continue to press for a single pan-Canadian body that is entirely independent of influence from government, the Coaching Association of Canada (CAC) and the national sport federations.<sup>145</sup>

## **2.4 Administrative Law**

### **2.4.1 Sport Tribunals**

Sport organizations are generally incorporated under the appropriate provincial or federal legislation which governs societies and corporations in that jurisdiction. They receive authority from their constitution, policies and bylaws through which they are entitled to provide various rights and require obligations that affect the members of their organization.<sup>146</sup> Members are protected from harm by civil law principles of negligence, which require that agents of the organization meet an objective standard of care.<sup>147</sup> Canadian sport organizations are considered private, self-governing entities, and as such they are subject to Canadian administrative law.<sup>148</sup>

Two important administrative legal principles resulted from the famous 1952 case, *Lee v Showmen's Guild of Great Britain*.<sup>149</sup> Lee went to the English courts requesting to be reinstated, having been suspended from his sales guild. This case established that a

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<sup>144</sup> Jelena Damjanovic, "U of T Researchers Call for Independent Complaint Processes to Tackle Abuse in Canadian Sport" *U of T News* (6 February 2020), online: <<https://www.utoronto.ca/news/u-t-researchers-call-independent-complaint-processes-tackle-abuse-canadian-sport>>.

<sup>145</sup> *Ibid.*; Peter Donnelly & Gretchen Kerr, "Revising Canada's Policies on Harassment and Abuse in Sport: A Position Paper and Recommendations" (2018) Centre for Sport Policy Studies, online: <[https://kpe.utoronto.ca/sites/default/files/harassment\\_and\\_abuse\\_in\\_sport\\_csps\\_position\\_paper\\_3.pdf](https://kpe.utoronto.ca/sites/default/files/harassment_and_abuse_in_sport_csps_position_paper_3.pdf)>.

<sup>146</sup> Findlay, *supra* note 29 at 3.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> *Lee v Showmen's Guild of Great Britain* (1952) 1 allER 1175.

tribunal has jurisdiction over matters resulting from its existing contractual relationship with its members. The court also held that tribunals must follow the rules of natural justice.<sup>150</sup> The concept of natural justice has since expanded to become a duty of procedural fairness that extends to all administrative tribunals that have the ability to impact the rights of individuals.<sup>151</sup>

A sport tribunal can therefore hold hearings, and those hearings must meet standards of procedural fairness,<sup>152</sup> that is, the tribunal must act fairly in the way it reaches its decision. Sometimes there are internal appeal mechanisms available, and a limited access to judicial review can be available to complainants in the courts. Judicial review does not usually provide an opportunity to review the substance of the decision however, except on a reasonableness standard. Thus, the substance of the decision will only be considered by the court if it is unreasonable, incoherent or irrational. This reasonableness standard tends to be applied in a deferential manner toward the tribunal, which greatly limits the role of the courts in appeals on matters of substance.<sup>153</sup> There is also the possibility of review on procedural fairness, but this is a very limited grounds for appeal.

Procedural fairness requires a right to a hearing, which means that the defendant must be informed of the case against them and given the opportunity to provide a defence. The defence may include written or oral statements, or a combination thereof. The issue of confidentiality frequently arises in sport conflicts, for example, when confidentiality is promised to individuals who are providing evidence. This has the potential to limit the ability of the complainant and the defendant to know the full circumstances of the case. Procedural fairness also requires lack of bias. Bias can be actual bias, where the decision

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<sup>150</sup> *Ibid.*

<sup>151</sup> Sara Blake, *Administrative Law in Canada* (Toronto: Butterworths 1992) at 13.

<sup>152</sup> Findlay, *supra* note 29 at 6.

<sup>153</sup> *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII)

maker is known to have a pre-established view. More common however, is apprehended bias, which is a reasonable suspicion that the decision maker may be affected by bias.<sup>154</sup>

The granting of membership in a sport organization implies that members have accepted the terms inherent in that contractual relationship.<sup>155</sup> An organization's constitution and policies will dictate the privileges and obligations of membership as well as processes for decision making and conflict resolution. Elite athletes are often required to sign private contracts with their sport organizations in addition to the standard contractual relationship that is implied by their membership in the organization. These agreements are intended to clarify the rights and obligations of the parties and they may include additional provisions setting out procedures for conflict resolution.<sup>156</sup>

Clearly stated policy and rules are essential. Decision makers who impose sanctions or discipline must be officially authorized to do so and must do so in accordance with the regulations of the organization.<sup>157</sup> The organization cannot endorse procedures or decisions that are in conflict with their organizational documents and the only way to alter the official procedure is to do so through formal governance channels.<sup>158</sup>

A significant part of the courts' authority extends to reviewing procedural fairness, for example, when time is of the essence or when circumstances are such that the complainant cannot receive a fair hearing because of bias.<sup>159</sup> Historically however, some sports federations went to great lengths to resist external involvement in dispute resolution. Until the 1990s, some federations even maintained bylaws that prevented athletes from seeking remedy from the courts.<sup>160</sup> The judicial limiting of grounds of appeal to questions of jurisdiction and fairness is based on the assumption that the

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<sup>154</sup> Findlay, *supra* note 29 at 6.

<sup>155</sup> *Ibid* at 4.

<sup>156</sup> *Ibid* at 6.

<sup>157</sup> *Ibid* at 5.

<sup>158</sup> *Ibid*.

<sup>159</sup> *Ibid* at 12.

<sup>160</sup> David, *supra* note 41 at 26.

policies of the organization reflect the wishes of its membership and that these have been written, considered and agreed to by the membership and should not be interfered with.<sup>161</sup>

Courts will not take it upon themselves to change policy, even if the policy is flawed. An example of this occurred in *Kane v Canadian Ladies Golf Association*.<sup>162</sup> Kane challenged the CLGA when they used a memo to abruptly change selection criteria for an international golf competition. Since proper change procedures had not been followed, the new selection criteria were deemed invalid by the court. Kane further requested that the court take it upon itself to set the new team for the golf tournament, however, in keeping with their reluctance to enter into policy matters, the court referred the decision back to the CLGA.<sup>163</sup>

If an individual is unhappy with a tribunal's decision, this does not establish grounds for appeal. As was evidenced by *Kane v Canadian Ladies Golf Association*, the courts will not create policy. If the sport authority acted properly and followed established procedure, the courts will generally refrain from getting involved.<sup>164</sup>

Athletes also have the additional option of filing an appeal with the Sport Dispute Resolution Centre of Canada (SDRCC)<sup>165</sup> The SDRCC is authorized under the *Physical Activity and Sport Act*.<sup>166</sup> It provides Canadian athletes with an alternative dispute resolution mechanism. It aims to provide inexpensive, efficient and informal dispute resolution that is transparent and accountable.<sup>167</sup>

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<sup>161</sup> Findlay, *supra* note 29 at 5.

<sup>162</sup> *Kane v Canadian Ladies Golf Association*, Unreported decision, September 1992, PEI Trial Division (Charlottetown).

<sup>163</sup> Findlay, *supra* note 29 at 18.

<sup>164</sup> *Ibid* at 7.

<sup>165</sup> Sport Dispute Resolution Centre of Canada, online: <<http://www.crdsc-sdrcc.ca/eng/file-an-appeal>>.

<sup>166</sup> *Physical Activity and Sport Act*, SC 2003, c 2.

<sup>167</sup> *Supra* note 165.

In conclusion, sport authorities should establish clear policy, including precise directives for hearings and appeals.<sup>168</sup> Avoiding use of the courts can be more efficient, less expensive, and may help to preserve working relationships of the adversarial parties. With this in mind, tools such as negotiation, mediation and arbitration can sometimes be effective alternatives to litigation.

That being said, it is important to note that when it comes to athlete complaints, investigations, hearings and appeals, athletes have been historically and systematically disadvantaged. Athletes are frequently unrepresented on the national and provincial boards which create policy that affects them.<sup>169</sup> Confidentiality clauses can prevent athletes from fully knowing what evidence has been gathered, which may prevent them from receiving a fair hearing. Privative clauses may deny athletes the opportunity to turn to the courts unless they have fully exhausted all internal options for dispute resolution. Given that athletes may be restricted by time pressures, limited finances, inability to travel, and given that they are the group with the least amount of power in the sport organization, requiring that athletes exhaust all available dispute resolution options effectively just gives more power to the sport authority.

#### **2.4.2 Human Rights Tribunals**

Human rights are defined as:

Legal guarantees intending to protect individuals from any form of state interference or negligence resulting in abuse or neglect. They imply individual entitlements between duty bearers (state) and the rights holders (individuals).<sup>170</sup>

Provincial human rights tribunals are a form of administrative tribunal, consequently human rights tribunal decisions can be appealed to the courts on grounds of

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<sup>168</sup> Findlay, *supra* note 29 at 7.

<sup>169</sup> *Ibid* at 23.

<sup>170</sup> David, *supra* note 41 at 19.

procedural fairness or lack of constitutionality. Canadian provinces and territories each have their own human rights legislation and although the content is similar, there are slight variations in the legislation.<sup>171</sup>

Canadian human rights legislation was influenced by the Canadian ratification of the *Universal Declaration of Human Rights* in 1948.<sup>172</sup> Federal human rights legislation protects people in Canada from harassment or discrimination by government entities and government agents.<sup>173</sup> Provincial and territorial human rights legislation protects people in Canada from discrimination by government, or agents of provincial and municipal government, or by businesses, and not for profit organizations.<sup>174</sup> Since sport is provincially regulated, the provincial human rights authority has jurisdiction over issues related to sport.

Harassment and sexual harassment can be litigated in criminal court if they meet the the higher standard required for the criminal offence of harassment.<sup>175</sup> Most often harassment is considered a human rights issue however, and human rights harassment complaints are heard by a provincial human rights tribunal. Harassment occurs in a relationship of trust

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<sup>171</sup> *Alberta Human Rights Act*, RSA 2000, c A-25.5, <<http://canlii.ca/t/536q1>> retrieved on 2020-07-31; *Human Rights Code*, RSBC 1996, c 210, <<http://canlii.ca/t/54b9j>> retrieved on 2020-07-31; *The Human Rights Code*, CCSM c H175, <<http://canlii.ca/t/535vs>> retrieved on 2020-07-31; *Human Rights Code*, RSO 1990, c H.19, <<http://canlii.ca/t/53kb6>> retrieved on 2020-07-31; *The Saskatchewan Human Rights Code*, 2018, SS 2018, c S-24.2, <<http://canlii.ca/t/53p9c>> retrieved on 2020-07-31; *Human Rights Act*, RSNS 1989, c 214, <<http://canlii.ca/t/53j7p>> retrieved on 2020-07-31; *Human Rights Code*, RSNL 1990, c H-14, <<http://canlii.ca/t/jzgj>> retrieved on 2020-07-31; *Human Rights Act*, RSNB 2011, c 171, <<http://canlii.ca/t/53mkm>> retrieved on 2020-07-31; *Human Rights Act*, RSPEI 1988, c H-12, <<http://canlii.ca/t/52tgj>> retrieved on 2020-07-31; *Human Rights Act*, SNU 2003, c 12, <<http://canlii.ca/t/530tk>> retrieved on 2020-07-31; *Human Rights Act*, SNWT 2002, c 18, <<http://canlii.ca/t/53pbx>> retrieved on 2020-07-31; *Human Rights Act*, RSY 2002, c 116, <<http://canlii.ca/t/53h5z>> retrieved on 2020-07-31; *Charter of Human Rights and Freedoms*, CQLR c C-12, <<http://canlii.ca/t/542k6>> retrieved on 2020-07-31.

<sup>172</sup> *Supra* note 73.

<sup>173</sup> Canadian Human Rights Commission, online :<<https://www.chrc-ccdp.gc.ca/eng/content/human-rights-in-canada>>.

<sup>174</sup> Jiwon Chun, “Overview of Human Rights Codes by Province and Territory in Canada” Canadian Centre for Diversity and Inclusion (January 2018), online:<<https://ccdi.ca/media/1414/20171102-publications-overview-of-hr-codes-by-province-final-en.pdf>>.

<sup>175</sup> *Criminal Code* RSC, 1985, 264.

and power imbalance.<sup>176</sup> The party experiencing harm can be an individual or a group. Harassment is an infringement of human rights that are protected by provincial human rights legislation, such as discrimination based on: race, religion, gender, sexuality, disability, age or ethnic origin.<sup>177</sup> Sexual harassment is any sexualized form of harassment.

The majority of sport-related human rights cases are based on complaints of sexual discrimination in sport. Justine Blainey first raised this issue in 1986.<sup>178</sup> Blainey was denied a spot on a Metro Toronto Hockey League Team because the league regulations at the time did not permit females to play on male teams. Her discrimination complaint was heard by the Ontario Human Rights Commission.<sup>179</sup>

Blainey initially lost her case because the Ontario Human Rights legislation explicitly allowed for discrimination in sport. Blainey had no ability to appeal to the courts because the Ontario Human Rights decision was reasonable and was consistent with the legislation. Instead, she brought a *Charter* challenge in the Ontario Supreme Court, under Section 15 of the *Canadian Charter of Rights and Freedoms*.<sup>180</sup> She claimed that the section of the Ontario Human Rights legislation that permitted discrimination in sport was in breach of the *Charter*. Section 15 of the *Charter* states:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination

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<sup>176</sup> Ljungqvist A, Mountjoy M & Brackenridge C. “Consensus Statement: Sexual Harassment and Abuse in Sport”, 8 Feb 2007, online: <<https://multimedia.olympic.org/pdf/enreport1125.pdf>>.

<sup>177</sup> *Ibid.*

<sup>178</sup> *Blainey v. Ontario Hockey Association (1986) 54 O.R. (2d) 513.*

<sup>179</sup> *Ibid.*

<sup>180</sup> *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UL)*, 1982, c11.

based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.<sup>181</sup>

After initially losing her *Charter* challenge, Blainey finally won her case at the Ontario Court of Appeal. The Court of Appeal held that Canadian provincial human rights codes are statutes that must comply with the *Canadian Charter of Rights and Freedoms*. It was determined by the Ontario Court of Appeal that sexual discrimination against Blainey was not justified under Section One of the *Charter*, so the discriminatory section of the *Ontario Human Rights Code* was struck down.<sup>182</sup>

Several other female athletes have successfully taken sport sex discrimination complaints before their provincial human rights tribunals when they were not allowed to play on boys' teams or were not treated equally.<sup>183</sup> Athlete plaintiffs, like Blainey, will consider whether a complaint of harassment or discrimination is more efficiently and effectively heard by their sport authority, a provincial human rights tribunal or, when possible, by pursuing remedies through the judicial system. Harassment complaints are often addressed in a sport organization's code of conduct and can be handled through internal proceedings, which decisions may also be reviewed in court.<sup>184</sup>

### 2.4.3 Criminal Law

The key *Criminal Code* sections that may be related to athlete maltreatment include: sexual exploitation, young person, sexual interference, invitation to sexual touching, luring, trafficking, child pornography, sexual assault, consent, no defence of consent, and close in age exceptions.

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<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid.*

<sup>183</sup> *Hawkins v Little League Canada* 2009 CarswellBC 3792; *Pasternak v Manitoba High Schools Athletic Assn* [2006] MHRBAD No 2; *Beacon Hill Little League Major Girls Softball Team - 2005 v Little League Canada* 2009 CarswellBC 74.

<sup>184</sup> Donnelly, *supra* note 145 at 16.



The WHO defines exploitation as: “Commercial or other exploitation of a child refers to use of the child in work or other activities for the benefit of others. This includes, but is not limited to, child labour and child prostitution.”<sup>185</sup>

When athlete maltreatment is sexual in nature, the *Canadian Criminal Code*<sup>186</sup> provides the following legal definitions for the potential applicable offences:

Sexual Exploitation is a sexual crime committed against someone who is sixteen or seventeen years old. It is defined by section 153 (1):

Every person commits an offence who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative of the young person, and who (a) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person; or (b) for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person.<sup>187</sup>

Young person, for the purposes of section 153, is defined by subsection 151(2) of the *Criminal Code* as: “a person 16 years of age or more but under the age of eighteen years.”<sup>188</sup> Thus, section 153 applies only to individuals who are sixteen or seventeen years old. There are no specific *Criminal Code* provisions to protect athletes 18 years of

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<sup>185</sup> WHO, *Report of the Consultation on Child Abuse Prevention*, WHO/HSC/PVI/99.1, Geneva (1999).

<sup>186</sup> *Criminal Code*, RSC 1985.

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

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

age and over from sexual exploitation by coaches or other individuals in a position of trust.

Sexual interference is a sexual crime committed against someone who is under sixteen years old. It is defined by the *Criminal Code* in section 151:

Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years.<sup>189</sup>

This section automatically assumes guilt based on the complainant being under 16 years old. Invitation to sexual touching is a non-touching relational sexual offence committed against someone under sixteen years old. It is defined by section 152 of the *Criminal Code* as:

Every person who, for a sexual purpose, invites, counsels or incites a person under the age of 16 years to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person under the age of 16 years.<sup>190</sup>

Luring is defined in Section 172.1 as :

72.1 (1) Every person commits an offence who, by means of a computer system within the meaning of subsection 342.1(2), communicates with  
(a) a person who is, or who the accused believes is, under the age of eighteen years, for the purpose of facilitating the commission of an offence under subsection 153(1), section 155 or 163.1,

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<sup>189</sup> *Ibid.*

<sup>190</sup> *Ibid.*

subsection 212(1) or (4) or section 271, 272 or 273 with respect to that person;

(b) a person who is, or who the accused believes is, under the age of sixteen years, for the purpose of facilitating the commission of an offence under section 80 with respect to that person; or

(c) a person who is, or who the accused believes is, under the age of fourteen years, for the purpose of facilitating the commission of an offence under section 151 or 152, subsection 160(3) or 173(2) or section 281 with respect to that person.

Trafficking is defined by Section 279.01 of the *Canadian Criminal Code* as follows:

Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence.

Other *Criminal Code* human trafficking offences include: Section 279.011 Trafficking of a person under the age of eighteen years; Section 279.02 Knowingly getting money or other benefits from human trafficking; and Section 279.03 Taking or destroying travel or personal identification documents of a person being trafficked.

Child Pornography is defined by Section 163.1 (1) of the *Criminal Code* as:

(a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,

(i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or

(ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years;

(b) any written material, visual representation or audio recording that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act;

(c) any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act; or

(d) any audio recording that has as its dominant characteristic the description, presentation or representation, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act.

#### Accessing child pornography Section (4.1)

Every person who accesses any child pornography is guilty of

a) an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; or

b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

Sexual assault is prohibited by Section 271 and 272 of the *Criminal Code*. Section 271 includes any assault or threat that is sexual in kind, and it may range in severity from any

form of unwanted touching to rape.<sup>191</sup> Section 272 applies to sexual assaults that involve third party threats, weapons, or bodily harm.<sup>192</sup> The crime of sexual assault has no restrictive age parameters.

Women's Legal Education and Action Fund (LEAF) explains Canada's sexual assault law as follows : It includes all unwanted sexual activity, such as unwanted sexual grabbing, kissing, and fondling as well as rape."<sup>193</sup> All sexual touching and any sexual contact requires consent.

Subsection 273.1(1) of the *Criminal Code* defines consent as:

The voluntary agreement of the complainant to engage in the sexual activity in question." Subsection 273.1(2) provides specific situations in which consent does not legally exist. They are:

"(a) the agreement is expressed by the words or conduct of a person other than the complainant; (a.1) the complainant is unconscious; (b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1); (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

There must be active communication of consent in order to establish that there was a consensual sexual interaction.<sup>194</sup> Neither

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<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*

<sup>193</sup> LEAF, "The Law of Consent in Sexual Assault", online:< <https://www.leaf.ca/the-law-of-consent-in-sexual-assault/>>.

<sup>194</sup> *R v Ewanchuk*, [1999] 1 SCR 330 [*Ewanchuk*].

silence nor lack of resistance are sufficient to constitute communication of consent.<sup>195</sup> The existence of consent must further be determined by considering the state of mind of the complainant at the time of the offence.<sup>196</sup>

No defence of consent - Section 150.1(1) of the *Criminal Code* removes any possible defence of consent for sexual offences involving a complaint under sixteen.<sup>197</sup> The only available exemption is if the parties are close in age. A youth of 12 or 13 years can consent to sexual interaction if there is less than two years age difference. A youth of 14 or 15 years can consent to sexual interaction if there is less than five years age difference.<sup>198</sup>

The legal age at which one can give sexual consent often seems to cause confusion for Canadians. This may be because the age of consent for sexual activity in Canada often depends on the respective ages and relationships of the parties. The generally understood age of consent is 16 years, however close in age exceptions state that a 12 or 13 year old can have consensual sexual activity with someone less than two years older who “is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant”.<sup>199</sup>

A 14 or 15 year old can have consensual sexual activity with someone who is less than five years older as long as there is no relationship of trust, dependency or exploitation.<sup>200</sup>

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<sup>195</sup> *R v M(ML)*, 1999 CanLII 711 (SCC) 17 at para 51.

<sup>196</sup> *Ewanchuk*, *supra* note 194.

<sup>197</sup> *Ibid*

<sup>198</sup> *Criminal Code*, RSC 1985.

<sup>199</sup> *Ibid* at s. 273.1(1).

<sup>200</sup> *Ibid*.

The age of consent is increased to 18 years if one of the parties to the sexual activity is in a position of trust or authority or if the activity involves prostitution or pornography.<sup>201</sup>

Achieving meaningful redress of athlete sexual assault, harassment and maltreatment via the criminal courts is challenging for all athletes, but this is particularly so for athletes over 18 years of age. Because many sports do not prohibit coach-athlete sexual relationships, lack of consent must be proven in court if athletes are over 18. Athletes may feel that they consented to sexual touching through acquiescence. Acquiescence does not constitute consent however.<sup>202</sup>

A relationship of trust almost always exists between an athlete and coach, particularly at the elite level. The existence of a trust relationship combined with the state of mind of the complainant, can be used to vitiate consent.<sup>203</sup> In the 1999 Supreme Court of Canada decision, *R v Ewanchuk*, a majority decision held that there is no defence of implied consent and decision makers must ask if the accused could have reasonably believed that the complainant consented. This requires examining the state of mind of the complainant at the time of the offence. The accused's perception of the complainant's state of mind is not relevant and consent must be given freely.<sup>204</sup>

If the complainant has a mental or physical disability, the requirements for proving sexual exploitation are covered under section 153.1 (1):

Every person who is in a position of trust or authority towards a person with a mental or physical disability or who is a person with whom a person with a mental or physical disability is in a relationship of dependency and who, for a sexual purpose, counsels or incites that person to touch, without that person's

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<sup>201</sup> *Ibid.*

<sup>202</sup> *Ewanchuk*, *supra* note 194.

<sup>203</sup> Janine Benedet & Isabel Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief" (2007) 52 McGill L J 243 at 285. 285

<sup>204</sup> *Ewanchuk*, *supra* note 194.

consent, his or her own body, the body of the person who so counsels or incites, or the body of any other person, directly or indirectly, with a part of the body or with an object....

A conviction for sexual touching where the complainant has a mental or physical disability, under section 153.1(1), requires that the complainant prove two things. First, that there was a position of trust, authority or a relationship of dependency and second, that no consent was given by the complainant. I will engage in a more thorough discussion of these requirements in my recommendations in Chapter Six.

Criminal law offers potential redress for athlete maltreatment offences that fall under Canadian *Criminal Code* provisions. Unfortunately, the criminal system is often lengthy and emotionally exhausting for all involved. When criminal penalties have the potential to significantly restrict the freedom of convicted offenders through incarceration, the *Criminal Code* places the highest possible burdens of proof on the prosecution, the standard of “beyond reasonable doubt”.

An accused may be acquitted because time limitations have expired, charges may be dismissed if they took place in another legal jurisdiction,<sup>205</sup> and witness testimony may sometimes be considered tainted by collusion,<sup>206</sup> otherwise unreliable or lacking credibility.<sup>207</sup> Courts frequently prefer not to question the technical knowledge of a professional coach.<sup>208</sup> The result may be that the accused is not convicted because the

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<sup>205</sup> *Charest c R*, 2017 QCCA 2048.

<sup>206</sup> *R v Canvin*, 2012 Carswell NWT 50.

<sup>207</sup> *R v R (M)*, 2014 CarswellOnt 10318.

<sup>208</sup> *Ibid*; Note: In *R v R (M)* 2014 CarswellOnt 10318, numerous witnesses corroborated each other’s testimonies regarding sexual assaults and sexual conversations with athletes by their skating coach. The witnesses appeared to establish evidence that would support conviction of the skating coach. The court remarked at great length upon the impressive poise and credibility of one of the witnesses, but in the decision the judge discounted the testimony of another witness and deferred to the coach’s “professional expertise”. The coach had resorted (unnecessarily) to technical sport language to explain his repeated inappropriate touching of athletes and his use of sexualized commentary. This case may suggest the need for a specialized sexual assault court with a judiciary that is trained in the nuances of sexual abuse and sexual assault, as well as further emphasizing the need for an independent professionally trained sport authority to hear such cases.



judge believes the case was not proven beyond a reasonable doubt.<sup>209</sup> Sentencing may be also affected if a coach is well supported by the sport club and community or because the offence was considered to be “out of character” and/or the accused showed remorse.<sup>210</sup>

Courts may also be reluctant to interpret behaviour as being of a sexual nature. In *R v Plews*,<sup>211</sup> the court found the accused guilty of common assault, but rejected charges of sexual assault, in spite of the fact that the evidence of the athlete witnesses described frequent “tickling” and play fighting episodes resulting in inappropriate touching, in a manner that would be considered by many safe sport academics as classic grooming behaviour.<sup>212</sup>

Similarly, in *R v Downes* a hockey and baseball coach was convicted of voyeurism for taking naked photos of young athletes in a dressing room without their knowledge. It was concluded that the athletes had a reasonable expectation of privacy in the locker room, but the court stated that the photos were not proven to be of a sexual nature.<sup>213</sup>

In *R. v. Haugo*,<sup>214</sup> the court held that a high school track coach’s sexually exploitative behaviour did constitute a breach of trust and that he had committed the offences of

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

<sup>210</sup> *Ibid*; *R v P (L)*, 2011 CarswellNun 9. Note: Academics such as Lisak have determined that most sexual offenders tend to be repeat offenders, and many are known to be highly charismatic, so it is concerning when sentences are dramatically reduced based on public support and the impression that the behaviour was out of character. See David Lisak and Susan Roth, “Motivational Factors in Non-incarcerated Sexually Aggressive Men” (1988) 55:5 *J. Personality and Social Psychology* 795 at 795. It is also concerning in that it may be suggestive of sentencing decisions giving more weight to concerns about the future prospects of the offender than the victim. See *People v Turner*, No. B1577162, Cal. Sup. Ct. 2 June 2016.

<sup>211</sup> *R v Plews*, 2010 CarswellOnt 8783.

<sup>212</sup> Brackenridge, *supra* note 43 at 211.

<sup>213</sup> *R v Downes* 2019 CarswellBC 1751. See also *R v Jarvis* 2019 SCC 10. At trial the judge deemed that photos taken of students without their permission were not proven beyond a reasonable doubt to be sexual. On appeal the court determined that the photos were of a sexual nature but that students did not have a reasonable expectation of privacy. At the SCC, the majority of the court found that the photos were sexual in nature and that is determined by an objective standard, that is, asking whether the photos should be reasonably perceived as intending to cause sexual stimulation in the observer. Further, the court confirmed that students have a reasonable expectation of privacy in their classrooms.

<sup>214</sup> *R v Haugo* 2006 CarswellBC 1705.

sexual exploitation, sexual assault and invitation to sexual touching under the *Criminal Code*. In sentencing however, the coach did not receive a period of incarceration, but rather was referred to restorative justice because the judge felt that the coach's behaviour was not indicative of a pattern of behaviour but rather was based on opportunity (see footnote 210).

Decisions and sentencing such as in *R. v. R. (M.)*, *R. v. Plews*, and *R. v. Haugo*, can be devastating for survivors of sexual crime and may not be effective in preventing reoffending. Athlete respondents interviewed for the qualitative study in Chapters Four and Five explained the personal impacts of an accused being found not guilty of charges relating to offences committed against them. Many of the respondents told the researcher, "He was acquitted of my charges." The decision was felt personally even if it was based on a technicality in law and not reflective of weakness in the witness testimony. It is important to acknowledge the significant impact of these decisions on survivors. Difficult criminal court experiences like these may deter other athlete complainants from using the criminal justice system.

In what is often considered the first big international story of athlete sexual abuse,<sup>215</sup> renowned Canadian hockey coach, Graham James was convicted of 350 counts of sexual exploitation in 1997. James served only 18 months of his three and a half year sentence, at which time he was given an unconditional pardon by the National Parole Board in 2007. When convicted a second time in 2012, James was sentenced to five more years of incarceration, with two more years added in 2015. One year later, in January 2016, James was granted day parole. Said former NHL player, Theo Fleury, one of James' many

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<sup>215</sup> There were of course, many other cases of athlete sexual exploitation and abuse before this one, but the James story made international headlines because many of the victims were famous professional hockey players, and also likely, because they were men.

victims, “By granting day parole the Canadian justice system just kept more victims of rape silent and feeling more shame today!”<sup>216</sup>

In December 2017, Alpine ski coach, Bertrand Charest received a sentence of 12 years for 37 convictions of sexual exploitation, sexual interference and sexual assault causing harm to young female athletes in his care. Two and a half years of that sentence had already been served due to the prolonged trial and sentencing, most of which were the result of Charest’s own strategic delays. At the conclusion of Charest's appeal in August 2019, the court upheld only 16 of the original 37 charges and his sentence was reduced by 21 months.<sup>217</sup> By this time, Charest had spent four years in a local jail, for which he was credited with almost six years served on his sentence, leaving him with a term of just four years and nine months of incarceration to serve.<sup>218</sup>

At sentencing, Justice François Doyon stated: “There has been no dramatic change in the appellant since the offences, but on the contrary, according to the evidence filed during the sentencing hearing, he continues to trivialize his conduct, to denigrate the plaintiffs and even wants to make some of them bear the responsibility for his actions... His narcissistic personality is still present.”<sup>219</sup>

In spite of the emotional impact of a diminished sentence on complainants, sentence severity has repeatedly been shown to have no effect on reducing crime.<sup>220</sup> Doob suggests that a more effective criminal sentencing strategy would focus on prevention rather than deterrence.<sup>221</sup> In the case of convicted offenders like Charest and James, their removal

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<sup>216</sup> Staff, “Disgraced Hockey Coach Graham James Granted Day Parole” CTV (25 Jan 2016) online: <<https://www.ctvnews.ca/canada/disgraced-hockey-coach-graham-james-granted-day-parole-1.2751051?cache=yes%3FclipId%3D64268>>.

<sup>217</sup> Canadian Press “Sex Abuser Ex-ski coach Bertrand Charest Continues to Trivialize his Conduct Appeal Judges Say” (22 Aug 2019).

<sup>218</sup> Charest, *supra* note 205.

<sup>219</sup> *Ibid.*

<sup>220</sup> Anthony N Doob & Cheryl Marie Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003) 30 *Crime & Justice: A Rev of Research* at 143.

<sup>221</sup> *Ibid.*

from society does little more than prevent further offences by that individual for a designated period of time. There is little promise of rehabilitation, and most problematically, incarceration does not address underlying systemic social and cultural issues.

From the perspective of survivors of crime, the criminal system provides no personal remedies or restitution, and little emotional comfort, and the process may be re-traumatizing. Rates of conviction in Canada are low, trials are frequently lengthy and sentences are often short.<sup>222</sup> Academics have warned that when safe sport efforts are focused on preventing or punishing individual offences against individual athletes, the root causes of violent crime may be unexamined and unchecked.<sup>223</sup> In addition to facing emotional exhaustion from the criminal trial and appeal process, if complainants do want to pursue personal remedies for pain and suffering or restitution for their financial losses, they have to find the energy and funds to bring a civil suit.

#### **2.4.4 Civil Law**

The civil system is potentially more efficient as a means to achieving redress for athlete maltreatment. The civil burden of proof is the lower standard of proof of a balance of probabilities so the chances of conviction are higher than in criminal court. A civil case is likely to be heard and concluded more quickly than one in criminal court because the liberty of an individual is not in question.

In criminal court, sentences usually involve incarceration or monetary fines, whereas successful plaintiffs in Canadian civil court have access to both legal and equitable remedies.<sup>224</sup> Legal remedies may provide damages in an amount that helps the plaintiff to

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<sup>222</sup> Note: Sentences are particularly short when compared to the American courts where USA Gymnastics team doctor, Larry Nassar, recently received three consecutive prison sentences for up to 75 years.

<sup>223</sup> *Ibid*; Anthony N Doob & Cheryl M Webster, "The Harper Revolution In Criminal Justice Policy... and What Comes Next" (2015) 36:3 Policy Options at 24; Michael Tonry, "Making American Sentencing Just, Humane, and Effective" (2016) 46 Crime & Just 441.

<sup>224</sup> Maurice Coombs & Bruce MacDougall, *Halsbury's Laws of Canada – Equitable Remedies (2020 Reissue) / Estoppel (2020 Reissue)* (Markham, On: LexisNexis Canada 2020).

recover from actual lost expenses or income. Equitable remedies may include rescission, rectification, specific performance and injunctions.<sup>225</sup> These options may bring greater satisfaction to the plaintiff. Punitive damages or restitution for example, may help to cover loss for pain and suffering. Specific performance may require an accused to act, perhaps by taking sensitivity training, or there could be an injunction to refrain from fraternizing with certain individuals, or ceasing coaching altogether.<sup>226</sup> Such civil remedies may be helpful in situations where the goal is to change coaching behaviour.

In cases where the accused is unable to pay a victim compensation settlement, the vicarious liability of the provincial or national sport organization will be key. This option also holds the most opportunity for creating public deterrence. Settlements for vicarious liability, such as in the Nassar case, in which Michigan State University was required to pay 500 million dollars,<sup>227</sup> have the potential to influence the future policy and behaviour of sport organizations around the world.

Vicarious liability and negligent hiring suits could find sport organizations liable to pay financial compensation to athletes if the organization has not done their due diligence when hiring or if they did not take action to prevent reasonably foreseeable harm.<sup>228</sup> The case of *Cavanaugh et al. v. Grenville Christian College et al.*<sup>229</sup> considered the legal responsibilities created by fiduciary duty and duty of care.

In this case students at a boarding school brought a class action against their former school and the estates of two former head masters, for negligence and failure to meet a standard of care. The court held that Grenville owed a duty of care to the students to take

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

<sup>226</sup> Michael Gibbons & Dana Campbell, "Liability of Recreation and Competitive Sport. Organizations for Sexual Assaults on Children by Administrators, Coaches and Volunteers" (2003) 13:3 J of Leg Aspects of Sport at 185.

<sup>227</sup> Mitch Smith & Anemona Hartocollis, "Michigan State's \$500 Million for Nassar Victims Dwarfs Other Settlements" *New York Times* (16 May 2018) online:<<https://www.nytimes.com/2018/05/16/us/larry-nassar-michigan-state-settlement.html>>.

<sup>228</sup> Gibbons, *supra* note 226.

<sup>229</sup> *Cavanaugh et al. v Grenville Christian College et al.* 2020 CarswellOnt 4498

reasonable steps to ensure their safety and protect them from physical, psychological and emotional harm and provide them with a safe learning environment. Grenville was also bound by a fiduciary duty to refrain from harmful acts, motivated by bad faith or self-interest.

The principle of duty of care requires that action is taken to avoid causing foreseeable harm. Mental harm in particular can have a lasting impact on one's ability to live a full life and pursue their goals.<sup>230</sup> The standard of care is an objective standard: should someone in the position of the defendants have reasonably foreseen that harm was or would be caused by their actions? The question is not whether the defendants foresaw the risk of harm.<sup>231</sup>

There are two types of institutional negligence. The first type is when an institution does not act to properly supervise staff, or they may not have created the necessary policies and procedure required to prohibit and effectively address improper staff behaviour. The second type of breach occurs when an institution actually creates the risk, through systemic negligence.<sup>232</sup>

The court found in *Cavanaugh et al. v. Grenville Christian College et al*, that the staff at Grenville intentionally created a fearful student body by establishing a punitive and harmful environment. The staff benefitted from this power and the institution benefitted from a public reputation of order and high standards. The methods at Grenville were not the known methods of any other schools at the time. A decision that there was systemic negligence resulted from the manner in which the defendants ran the institution and it did not require proof that every student experienced the same harms.

This case suggests that the doctrines of negligence and duty of care could be successfully applied to bring athlete maltreatment litigation against sport clubs which maintain a

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<sup>230</sup> *Saadati v. Moorhead*, 2017 SCC 28 at para. 23.

<sup>231</sup> *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19 at para. 53.

<sup>232</sup> Margaret Isabel Hall, "Theorizing the Institutional Tortfeasor" (2016) 53:4 *Alta L. Rev.* 995.

punitive and psychologically harmful environment for athletes. Sport organizations that are responsible for the oversight of those clubs could also be liable in negligence.

The doctrine of negligence can also be applied when sport organizations do not take reasonable care of the physical health of an athlete. In the case of *Robitaille v. Vancouver Hockey Club Ltd.*<sup>233</sup> a professional hockey player claimed that his hockey club had been negligent in not addressing his injuries. The club believed that Robitaille was making too much of the injury and it was mostly “in his head”. Robitaille was told to continue to play and he experienced a spinal contusion. This injury was also ignored by medical staff and a subsequent spinal injury resulted in Robitaille being permanently disabled. The court found that the sport organization had breached its duty of care to the athlete. The doctors that gave Robitaille the information that he could play were employees acting under the instructions of the organizational authorities, so the sport authority was found to be vicariously liable for the harm.<sup>234</sup>

Civil courts use the considerably lower standard of legal proof, “on a balance of probabilities”. Jahn says,

"Tort law is the best way to deter violent conduct among athletes [and coaches] and provide them an adequate remedy for their injuries. Tort law imposes financial liability on the athlete [coach or sport organization] and restores the plaintiff to his rightful position. The defendant is therefore forced to bear the costs of his violent conduct and this will hit him where it hurts most- in his pocketbook."<sup>235</sup>

Civil courts may offer athletes a chance to recover their financial losses, but athlete survivors still face many obstacles, beginning with understanding and getting access to the various options and remedies that might be available to them. Most athletes are unlikely to negotiate the civil system without independent legal counsel, which can come

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<sup>233</sup> *Robitaille v. Vancouver Hockey Club Ltd* 1981 Carswell BC 216

<sup>234</sup> *Ibid.*

<sup>235</sup> Gary Norman Jahn, “Civil Liability an Alternative to Violence in Sporting Events” (1988) 15:2 Ohio Northern University Law Review 243 at 254.

at considerable cost, and risk of often unwanted media exposure. Athletes who pursue restitution through the civil system frequently reach a settlement with the defendant before the case reaches the courts or the media. Many athlete survivors who settle their civil cases also sign non-disclosure agreements. This means that the actual number of maltreatment cases is entirely unknown and official statistics on athlete sexual abuse and maltreatment represent only a fraction of the actual figures.

Civil litigation may represent the quickest route to cultural change and effective athlete maltreatment prevention because financial penalties and damage to sport reputation are profoundly felt by sport organizations found guilty of vicarious liability, and the impact is publicly witnessed by everyone else. Lorraine Lafreniere, of the Coaching Association of Canada, says, “It’s a wakeup call for sports organizations to understand that punitive damages and lawsuits will be on the rise. We have seen it in the United States; damages awarded to victims are increasing.”<sup>236</sup> Unfortunately, as Brackenridge so often repeated, attention will only be paid to athlete maltreatment when the repercussions interfere with the organization’s primary objective of winning medals.<sup>237</sup>

## **2.5 Conclusion**

It is likely that sports organizations will always be focused on winning, but the creation of international and national sport dispute resolution bodies may offer athletes new avenues for redressing maltreatment issues. International human rights and child rights legislation and other international conventions, provide athletes with valuable theoretical support that can be referenced in their sport disputes. When athletes require dispute resolution for conflict with their coaches or sport authorities, they will need to choose between the administrative, criminal and civil systems. The choice will depend on the

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<sup>236</sup> Dan Barnes, “Alpine Canada Faces \$1.35 Million Lawsuit From Former Skiers” *Toronto Sun* (13 Dec 2018); Note: USA Gymnastics publicly declared bankruptcy in light of pending civil lawsuits amounting to hundreds of millions of dollars from athlete survivors in the Larry Nassar case. Michigan State paid 500,000 million dollars to resolve its Nassar law suits.

<sup>237</sup> Brackenridge, *supra* note 122 at 334.



circumstances of the case, the desired outcome and preferred remedies, and which body or bodies have jurisdiction to hear the dispute.

Each dispute resolution system comes with challenges and drawbacks, but perhaps if sport dispute resolution becomes more focused on prevention, rather than prosecution and penalties, cultural change will actually start to take place. If procedures consciously involve athlete empowerment, rather than privative clauses and non-disclosure agreements, then complainants may feel more satisfied at the conclusion of their hearings. Education is the first step toward shedding harmful misconceptions about athlete maltreatment, and this will require the establishment of comprehensive sport maltreatment definitions to set the stage for a clear discussion. Chapter Three will define maltreatment terms before entering into an examination of the academic literature on athlete maltreatment.

## CHAPTER THREE - LITERATURE REVIEW

### 3.1 Introduction

This chapter will examine the academic literature on maltreatment in sport to provide context for the qualitative study which will be discussed in Chapters Four and Five. The chapter will begin with a brief history of athlete maltreatment followed by definitions and clarification of relevant non-legal terms. The discussion of the academic literature will be organized using the four key themes that came out of the qualitative study, and which will be elaborated on in Chapter Five. The thematic categories represent the root causes of athlete maltreatment as identified by the athlete respondents. These categories are: **Historic Male Dominance in Sport, Insufficient Education on Maltreatment Issues in Sport, Distorted Priorities in Sport and Sport Self-Regulation.** The chapter will conclude with a discussion of the role of scholarship and the law in addressing athlete maltreatment issues.

### 3.2 History

Sexual abuse of athletes has received a disproportionate amount of attention as compared to other types of athlete maltreatment,<sup>1</sup> which has sometimes had the effect of creating moral panic, political pressure for redress, and a flurry of new policy and regulations that are not always supported by academic evidence.<sup>2</sup> Sexual abuse was the first form of athlete maltreatment to be recognized and academically studied and it is the most

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<sup>1</sup> Ashley Stirling, "Definition and Constituents of Maltreatment in Sport: Establishing a Conceptual Framework for Research Practitioners" (2009) 43:14 *British J Sports Medicine* at 1091; W Tschan, *Professional Sexual Misconduct in Institutions: Causes and Consequences, Prevention and Intervention* (Boston: Hogrefe Publishing, 2013).

<sup>2</sup> Peter Donnelly et al, "Protecting Youth in Sport: An Examination of Harassment Policies" (2016) 8:1 *Int J Sport Policy & Politics* 33 at 37.

researched form of athlete maltreatment.<sup>3</sup> It is the area most consistently addressed by sport organization policy and most often reported on by media. It is, however, one of the least frequently occurring<sup>4</sup> and not always the most harmful maltreatment behaviour.<sup>5</sup>

Child sexual abuse was the first area of child and youth maltreatment to receive scholarly attention. Academics studied the sexual abuse of children intermittently over the last hundred and fifty years, long before the issue of athlete maltreatment was ever considered.<sup>6</sup> Early in the twentieth century, medical professionals and academics were primarily concerned that victims of child sexual abuse might have suffered damaged reputations or have incurred physical harm,<sup>7</sup> consequently, sexual exploitation cases, prior to the 1930s, were often resolved by marriage or financial compensation.<sup>8</sup>

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<sup>3</sup> Celia Brackenridge, *Spoilsports: Understanding and Preventing Sexual Exploitation in Sport* (London: Routledge, 2001) at 16; Celia Brackenridge, "Fair Play or Fair Game? Child Sexual Abuse in Sport Organizations" (1994) 29 *Int Rev Sociology Sport* at 287; Jan Toftegaard Nielsen, "The Forbidden Zone: Intimacy, Sexual Relations and Misconduct in the Relationship Between Coaches and Athletes" (2001) 36:2 *Int Rev Sociology of Sport* at 165; Kari Fasting, "Research on Sexual harassment and Abuse in Sport" (2005) *Idrotts Forum, Nordic Sport Science Forum*, online: <[https://www.researchgate.net/publication/255570351\\_Research\\_on\\_Sexual\\_Harassment\\_and\\_Abuse\\_in\\_Sport](https://www.researchgate.net/publication/255570351_Research_on_Sexual_Harassment_and_Abuse_in_Sport)>; Kari Fasting, Celia Brackenridge & Jorunn Sundgot-Borgen, "Experiences of Sexual Harassment and Abuse Among Norwegian Elite Female Athletes and Nonathletes" (2003) 74:1 *Research Quarterly for Exercise and Sport* at 83.

<sup>4</sup> Victoria Roberts, Victor Sojo & Felix Grant, "Organizational Factors and Non-Accidental Violence in Sport: A Systematic Review" (2019) *Sport Mgmt Rev* at 4, online: <<https://www.sciencedirect.com/science/article/abs/pii/S1441352318304455>>; Ashley Stirling & Gretchen Kerr, "Abused Athletes' Perceptions of the Coach-Athlete Relationship" (2009) 12:2 *Sport in Society* at 227; Misia Gervis & Nicola Dunn, "The Emotional Abuse of Elite Child Athletes by their Coaches" (2004) 13:3 *Child Abuse Rev* 215; Peter Donnelly & Gretchen Kerr, "Revising Canada's Policies on Harassment and Abuse in Sport: A Position Paper and Recommendations" (2018) *Centre for Sport Policy Studies* 1 at 36 & 38; Gretchen Kerr, Erin Wilson & Ashley Stirling, "Prevalence of Maltreatment Among Current and Former National Team Athletes", (30 April 2019), at 11, online: [athletescan.com <https://athletescan.com/sites/default/files/images/prevalence\\_of\\_maltreatment\\_reporteng.pdf>](https://athletescan.com/sites/default/files/images/prevalence_of_maltreatment_reporteng.pdf); Sandra Kirby, Lorraine Greaves & Olena Hankivsky, *The Dome of Silence: Sexual Harassment and Abuse in Sport* (Halifax: Fernwood Publishing, 2000) at 47.

<sup>5</sup> Kerr, *supra* note 4.

<sup>6</sup> Allan McLane Hamilton & Lawrence Godkin, *A System of Legal Medicine* (New York: EB Treat, 1894). Note: The first known published study of child sexual abuse was in France in 1857.

<sup>7</sup> Steven Mintz, "Placing Childhood Sexual Abuse in Historical Perspective" (2012) *Social Science Research Council*, online: <<https://tif.ssrc.org/2012/07/13/placing-childhood-sexual-abuse-in-historical-perspective/>>.

<sup>8</sup> *Ibid.*

It was not until the 1940s and 50s that professionals considered the lasting impact of emotional trauma on sexual abuse survivors.<sup>9</sup> In the 1950s, criminal trials and sentences for sexual crimes against children were significantly influenced by race and social standing, since experts frequently believed that working class and black children were more sexually advanced than their white middle-class peers.<sup>10</sup>

Historic interest in sexual crimes against children and youth often coincided with rising public fears of a perceived threat to the traditional family unit or to social privilege.<sup>11</sup> In the 1950s, 60s, and 70s,<sup>12</sup> these fears were sometimes prompted by social, economic and political trends such as dramatic increases in immigration, surging divorce rates, women's entry into the workforce, child labour regulation and "juvenile delinquency".<sup>13</sup>

Child protection interventions were not always motivated by concerns for the wellbeing of children however, in fact the underlying goal was often to address concerns about the corruption of social morality, or to respond to public pressure caused by media sensationalism about these issues.<sup>14</sup> In the 60s and 70s, second wave feminists began a public discussion on violence and sexual violence against women and children,<sup>15</sup> which provoked early conversations about gender discrimination and sexual harassment in sport.<sup>16</sup>

Early academic studies on sexual violence toward children often labelled perpetrators as sexual deviants exhibiting abnormal social behaviour, and experts sometimes debated

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<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> Alfred C Kinsey et al, *Sexual Behavior in the Human Female* (Bloomington: WB Sanders, 1953); Mintz, *supra* note 7.

<sup>12</sup> David Finkelhor, "Sexual Abuse: A Sociological Perspective" (1982) 6 *Child Abuse & Neglect* 95; David Finkelhor, *Child Sexual Abuse: New Theory and Research* (New York: Free Press, 1984) at 25.

<sup>13</sup> Mintz, *supra* note 7; Paulo David, *Human Rights in Youth Sport* (London: Routledge, 2005) at 57.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> Brackenridge, *supra* note 3.

what role the children themselves might have played in provoking or encouraging the sexual abuse.<sup>17</sup>

[E]xpert opinion has often shown more understanding for the perpetrators than the victims, overemphasizing victims' resilience and minimizing the abusers' responsibility and the corporate cultures and institutional arrangements that facilitate abuse.<sup>18</sup>

Early statistical reports on the “surprising” prevalence of child sexual abuse, in the 60s and 70s, created little response, likely because there was already so much misinformation and disbelief surrounding the issue.<sup>19</sup> These historic examples demonstrate public, professional and academic misunderstanding regarding the causes, prevalence, perpetrators, victims and harms of child sexual abuse. For example, early government responses primarily focused on alleviating social fears, academics and medical professionals singled out individual perpetrators as the causes of child sexual abuse labelling perpetrators as abnormal or pedophiles, and almost everyone, to some degree, blamed the victims.<sup>20</sup>

Following upon sport discrimination and harassment conversations of the 1970s, the issue of sport-related sexual abuse was first identified by academics in the late 1980s.<sup>21</sup> Perhaps not surprisingly, the same misguided responses that had played out in the early analyses of child sexual abuse were replayed by governments, sport organizations, media and members of the public throughout the eighties, nineties and early 2000s in response to

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<sup>17</sup> Mintz, *supra* note 7.

<sup>18</sup> *Ibid.*

<sup>19</sup> David Finkelhor & Angela Browne, “Impact of Child Sexual Abuse: A Review of the Research” (1986) 99:1 *Psychological Bulletin* 66; Mary Wells, *Canada's Law on Child Sexual Abuse: A Handbook* (Ottawa : Department of Justice Canada 1990); Beverly Gomes-Schwartz, Jonathan M Horowitz & Albert P Cardarelli, *Child Sexual Abuse: The Initial Effects* (Newbury Park, California: Sage 1990) at 51.

<sup>20</sup> Mintz, *supra* note 7; Brackenridge, *supra* note 3.

<sup>21</sup> Celia Brackenridge, “Child Sexual Abuse (CSA)” in Dominic Malcolm, ed, *The Sage Dictionary of Sports Studies* (London: Sage Publications, 2008) at 41; David, *supra* note 13 at 94.

athlete sexual abuse and maltreatment. Academics were however beginning to gain a deeper understanding of the issues, causes and repercussions.<sup>22</sup>

Disbelief about reports of athlete maltreatment and sexual abuse meant that reputations of sport organizations and jobs of revered coaches were often protected at the expense of victims. Criminal convictions for sexual crimes, like that of hockey coach, Graham James,<sup>23</sup> were commonly dismissed as the one-off crimes of “monsters” and as aberrations in the system.<sup>24</sup> Athlete complainants were frequently disbelieved, their claims of maltreatment and sexual abuse easily blamed on athlete dissatisfaction, bitterness or “craziness”.<sup>25</sup>

As with child sexual abuse, early studies and prevention strategies regarding athlete maltreatment, and in particular athlete sexual abuse (as this was the first area to receive significant attention), tended to focus on individual predictors such as the personal circumstances and psychological characteristics of perpetrators and victims.<sup>26</sup> Academics now believe that maltreatment and sexual abuse within sport institutions usually result from a combination of circumstances.<sup>27</sup> This list may include organizational, social, situational and developmental factors, all of which can increase the likelihood of a sport

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<sup>22</sup> Brackenridge, *supra* note 3.

<sup>23</sup> *R v James* (2013), 2013 CarswellMan53 (Man CA); Gordon I Kirke, “Players First: A Report Commissioned By the CHL”, (1997), online: <<http://www.canoe.ca/PlayersFirst/home.html>>; Sheldon Kennedy with James Grainger, *Why I Didn't Say Anything* (London, Ontario: Insomniac, 2011).

<sup>24</sup> Brackenridge, *supra* note 3.

<sup>25</sup> Brackenridge, *supra* note 3 at 168; Mary Cain, “I Was the Fastest Girl in America Until I Joined Nike” *The New York Times* (7 Nov 2019), online: <<https://www.nytimes.com/2019/11/07/opinion/nike-running-mary-cain.html>>.

<sup>26</sup> Margo Mountjoy et al, “International Olympic Committee Consensus Statement: Harassment and Abuse (Non-Accidental Violence) in Sport” (2016) 50:1 *British J Sports Med* at 1019, online: <[doi:10.1136/bjsports-2016-096121](https://doi.org/10.1136/bjsports-2016-096121)>.

<sup>27</sup> WL Marshall & HE Barbaree, “An Integrated Theory of the Etiology of Sexual Offending”, in WL Marshall, DR Laws & HE Barbaree eds, *Handbook of Sexual Assault: Applied Clinical Psychology* (Boston: Springer, 1990) at 257; Roberts, *supra* note 4.

leader engaging in athlete maltreatment.<sup>28</sup> Academics have also concluded that sport sexual abuse is usually a crime of opportunity and an expression of power.<sup>29</sup>

Roberts, Sojo and Grant point to “organizational tolerance” and “conformity to dominant values” as overriding organizational factors which contribute to all categories of athlete maltreatment: psychological, sexual, physical and neglect.<sup>30</sup> Roberts et al. further suggest the lack of effective prevention of athlete maltreatment to date can be, at least in part, blamed on the tendency to persist with individual causation focus and prevention strategies rather than taking a more integrated and systemic approach.<sup>31</sup>

Since less than 5% of the general population<sup>32</sup> are believed to have a predisposed sexual preference for children, and considering that sexual abuse occurs less frequently than most other forms of athlete maltreatment, except for physical maltreatment,<sup>33</sup> focusing athlete maltreatment prevention strategies on identifying and screening out potential sexual offenders is likely to be ineffective. Roberts et al. suggest that organizational characteristics are more important than individual characteristics as predictors of athlete maltreatment. They recommend addressing athlete maltreatment by identifying the systemic drivers of these behaviours and bringing a wholistic approach to safeguarding in sport.<sup>34</sup>

Although there appears to be little merit in focusing on perpetrator characteristics, there may be legitimate reasons for paying attention to athlete characteristics and circumstances. In doing so there is a danger that focusing on individual athlete traits, rather than systemic sport influences, could potentially lead to victim blaming and

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<sup>28</sup> *Ibid*; Celia Brackenridge & Daniel Rhind, “Child Protection in Sport: Reflections on Thirty Years of Science and Activism” (2014) 3 J Soc Sci 326.

<sup>29</sup> Roberts, *supra* note 4.

<sup>30</sup> *Ibid* at 2.

<sup>31</sup> *Ibid*.

<sup>32</sup> “Pedophilia”, Psychology Today (22 Feb 2019),  
online: <<https://www.psychologytoday.com/ca/conditions/pedophilia>>.

<sup>33</sup> Kerr, *supra* note 4 at 11.

<sup>34</sup> Roberts, *supra* note 4.

redirect prevention focus back to individuals rather than organizations. Thus it should be said that no athlete is ever responsible for inviting or causing maltreatment, but it may be useful to recognize the personal characteristics which can sometimes make athletes more vulnerable to maltreatment so that educated professionals working within sport institutions can exercise vigilance when those particular situations arise.

Studies on athlete sexual abuse<sup>35</sup> have shown that personal characteristics potentially putting athletes at greater risk may include: family instability, parental inattentiveness or neglect, self-questioning of gender and/or sexuality, identifying as a member of a minority, and living with disabilities or low self-esteem.<sup>36</sup> More research is necessary to be certain, but it is likely that many of these characteristics will also increase athlete vulnerability to other forms of maltreatment. Vulnerability to sexual abuse is further enhanced by trust relationships and power imbalance and these are also likely to impact other forms of maltreatment.<sup>37</sup> Breach of trust is recognized as a significant factor in the impact of trauma experienced by athlete maltreatment survivors.<sup>38</sup>

Bjørnseth and Szabo found that athletes with higher than average need for approval seem to have a higher likelihood of being subjected to sexual abuse.<sup>39</sup> Excessive trust exhibited by athlete parents, and sometimes obtained through grooming of athlete parents, can also make athletes more accessible to potential sexual offenders.<sup>40</sup> Athlete need for approval and parental trust in the coach may also increase the likelihood of other types of athlete maltreatment because perpetrators may feel invulnerable.

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<sup>35</sup> Note: There are considerably more academic studies available on athlete sexual abuse than on the more general topic of athlete maltreatment, so sometimes this thesis will reference sexual abuse studies for their contextual and informative value with the knowledge that there may not be a proven direct application to all areas of athlete maltreatment.

<sup>36</sup> Ben Mathews, *New International Frontiers in Child Sexual Abuse: Theory, Problem and Progress* (Cham, Switzerland: Springer, 2019) at 163.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> Ingunn Bjørnseth & Attila Szabo, "Sexual Violence Against Children in Sports and Exercise: A Systematic Literature Review" (2018) 27:4 J Child Sexual Abuse 1.

<sup>40</sup> Stirling, *supra* note 1.



Since the research on athlete maltreatment is still relatively new, there are many areas of uncertainty in the literature. Low athlete survey response rates,<sup>41</sup> and the habitual underreporting of athlete maltreatment and sexual abuse,<sup>42</sup> have contributed to a lack of statistical data.<sup>43</sup> This makes it difficult to compare conclusions across international borders and between academic studies.<sup>44</sup> Differing definitions and categorizations of types of athlete maltreatment,<sup>45</sup> combined with the potential for subjectivity on the part of researchers and survey respondents, sometimes results in inconsistencies in collected data, interpretation of information and statistical outcomes.<sup>46</sup> For these reasons, it will be beneficial to begin by establishing clear definitions for use in this thesis.

### 3.3 Concepts and Terminology

The terminology used to identify the various athlete maltreatment offences has been inconsistently applied across academia, in law, as well as in international conventions and sport policy.<sup>47</sup> Porter, Antonishak and Reppucci also identified this as a significant problem in addressing the issues of child maltreatment in society in general.<sup>48</sup> Stirling says irregularity in terms and definitions has been a significant shortcoming in the academic writing on athlete maltreatment.<sup>49</sup>

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<sup>41</sup> Fasting (2003), *supra* note 3. Note: Higher athlete response rates occurred when the study included more general questions about athlete wellbeing rather than specifically focusing on sexual harassment and maltreatment.

<sup>42</sup> Brackenridge, *supra* note 3 at 54.;

<sup>43</sup> David, *supra* note 13 at 10 and 94.

<sup>44</sup> Stirling, *supra* note 1 at 2.

<sup>45</sup> MR Porter, J Antonishak & ND Reppucci, "Policy and Applied Definitions of Child Maltreatment", in MM Feerick, JF Knutson & PK Trickett eds, *Child Abuse and Neglect: Definitions, Classifications, and a Framework for Research* (Baltimore: Brooks Publishing, 2006) at 331.

<sup>46</sup> Fasting (2005), *supra* note 3; Fasting (2003), *supra* note 3.

<sup>47</sup> Stirling, *supra* note 1 at 2.

<sup>48</sup> Porter, *supra* note 45.

<sup>49</sup> Stirling, *supra* note 1.

Inconsistencies, though sometimes problematic, can usually be explained by examining the mission and perspective behind the organization, policy or academic work.<sup>50</sup> The frequent interchangeable use of terms like maltreatment, abuse, harassment and bullying can however lead to confusion over what constitutes these behaviours.<sup>51</sup> Lack of explicit identification of certain types of maltreatment, like neglect, and the occasional total omission of such terms from the discussion, can sometimes result in a diminished understanding of these offences or they may be overlooked entirely.<sup>52</sup>

In this thesis, I primarily engage the term **athlete maltreatment**, as it is currently the most widely accepted, most inclusive, non-value-laden term to describe the various forms of athlete abuse.<sup>53</sup> In this section, I will define the term athlete maltreatment, as well as the four sub-categories of athlete maltreatment.

Athlete maltreatment is sometimes used interchangeably with the terms “abuse”, “harassment” and “non-accidental violence.”<sup>54</sup> **Non-accidental violence** was the term used in the 2016 International Olympic Committee (IOC) Consensus Statement,<sup>55</sup> and employed thereafter by, Roberts, Sojo and Grant, who indicate that this term is preferred by them because it explicitly identifies that the harmful, or violent, act is an intentional one, although the resulting harm need not be intended.<sup>56</sup>

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<sup>50</sup> Ashley Stirling & Gretchen Kerr, “Defining and Categorizing Emotional Abuse in Sport” (2008) 8:4 European J Sport Sci 173.

<sup>51</sup> Stirling, *supra* note 1.

<sup>52</sup> *Ibid.*

<sup>53</sup> Donnelly, *supra* note 2 at 37; Stirling, *supra* note 1.

<sup>54</sup> Mountjoy, *supra* note 26 at 1019-1029.

<sup>55</sup> *Ibid.*

<sup>56</sup> Roberts, *supra* note 4 at 4. Note: This nuance is easily missed however and consequently the term may be misleading. The term non-accidental violence seems to potentially imply that if there was intent for the violence, there may have also been intent for the harm that was caused.

The term athlete maltreatment<sup>57</sup> is preferred over non-accidental violence by most academics however.<sup>58</sup> This is also the term preferred by the researcher because it puts the emphasis on the athlete and how they are being treated rather than focusing on the harmful act and the intentions of the perpetrator, as is suggested by non-accidental violence.

The term athlete maltreatment encompasses all forms of maltreatment, including psychological maltreatment and neglect. Non-accidental violence is more strongly suggestive of physical and sexual violence and does not obviously include the subtler maltreatment forms of psychological maltreatment and neglect. Preference for the term athlete maltreatment over the term non-accidental violence could further be related to the importance of avoiding the use of overly “anaesthetized” language, which is recognized as significantly diminishing the perceived impact of negative behaviour.<sup>59</sup>

There are many definitions of the term athlete maltreatment. Stirling favours the, non-sport specific, **child maltreatment** definition provided by Crooks and Wolfe: “Volitional acts that result in or have the potential to result in physical injuries and/or psychological harm.”<sup>60</sup> This definition identifies the key requirements of intention and potential for harm, but it does not specifically mention behaviours of neglect and omission, and it does not identify the trust relationship. This definition has been accepted by many in the fields

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<sup>57</sup> Michael Reynolds, “A Theoretical Exploration of the Relationship Between the Expectations of Sports Coaches and the Physical and Emotional Health of Athletes” (2000) 3:2 J Sci & Med Sport 51.

<sup>58</sup> Donnelly, *supra* note 2; Stirling, *supra* note 1; Jeff Noble & Mark Vermillion, “Youth Sport Administrators’ Perceptions and Knowledge of Organizational Policies on Child Maltreatment” (2014) 38 Children and Youth Services Rev at 52.

<sup>59</sup> Wendy MacGregor, “It’s Just a Game Until Someone Is Sexually Assaulted: Sport Culture and the Perpetuation of Sexual Violence by Athletes” (2018) 28:1 Ed & Law J 43 at 23 and 64; Deb Waterhouse-Watson, *Athletes, Sexual Assault, and “Trials by Media”: Narrative Immunity* (New York: Routledge, 2013) at 132 and 136.

<sup>60</sup> CV Crooks & DA Wolfe, “Child Abuse and Neglect” in EJ Mash & RA Barkley, eds, *Assessment of Childhood Disorders* 4th ed (New York: Guilford Press, 2007) at 10.

of both child and athlete maltreatment as a useful working definition in spite of these minor shortcomings.<sup>61</sup>

The Canadian Academy of Sport and Exercise Medicine officially adopted the British Journal of Sports Medicine's definition. They have chosen to use the term **athlete abuse**, which for many people has a sexual abuse connotation, and which may therefore inadvertently exclude other forms of maltreatment from the discussion. Apart from this issue, the definition provides a clear description, which includes the prerequisite trust relationship and indicates that the behaviour is a repeated pattern. It states:

Abuse is defined as a pattern of physical, sexual, emotional or negligent ill-treatment by a person in a caregiver capacity (e.g. parent, coach) resulting in actual or potential harm to the athlete. The four major recognized types of abuse are physical abuse, sexual abuse, emotional abuse, and neglect.<sup>62</sup>

The World Health Organization (WHO) uses a similar definition to the above definition of the Canadian Academy of Sport and Exercise Medicine, although in this instance the WHO is defining child abuse rather than athlete maltreatment.<sup>63</sup> They define child abuse as:

[A]ll forms of physical and/or emotional ill-treatment, sexual abuses, neglect or negligent treatment or commercial or other exploitation, resulting in actual or potential harm to the child's health, survival, development or dignity in the context of a relationship of responsibility, trust or power.<sup>64</sup>

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<sup>61</sup> Stirling, *supra* note 1.

<sup>62</sup> Mannat Mohanjeet Singh, Shradha S Parsekar, & Sreekumaran N Nair, "An Epidemiological Overview of Child Sexual Abuse" (2014) 3:4 J Family Med Prim Care 430; online: <doi: 10.4103/2249-4863.148139 PMID: PMC4311357 PMID: 25657958>.

<sup>63</sup> WHO, Report of the Consultation on Child Abuse Prevention, WHO/HSC/PVI/99.1, Geneva (1999).

<sup>64</sup> *Ibid.*

Although this definition is not specifically written as a definition for athlete maltreatment, it is both specific and comprehensive, and I will adopt it for the purposes of this thesis, by replacing the term “child” with “athlete” as follows:

[A]ll forms of physical and/or emotional ill-treatment, sexual abuses, neglect or negligent treatment or commercial or other exploitation, resulting in actual or potential harm to the athlete’s health, survival, development or dignity in the context of a relationship of responsibility, trust or power

The WHO definition lists the four categories of maltreatment, which are the same for both child maltreatment and athlete maltreatment. The WHO definition also notably identifies the importance of the relationship of responsibility, trust or power. All athletes are vulnerable to maltreatment because of the potential for sport-related unbalanced power relationships, so for this reason the definition is applicable to athletes of all ages, and not just to child athletes.

The WHO definition recognizes that there need only be the potential for harm, and it extends that harm to include harm to one’s development or dignity, as well as raising the issue of harm through commercial or other forms of exploitation. All of these issues are increasingly relevant for athletes. The only remaining question is whether there needs to be a pattern of repeated behaviour, as expressed in the definition adopted by the Canadian Academy of Sport and Exercise Medicine, or whether athlete maltreatment can be a one time occurrence.

In most cases athlete maltreatment does occur as a repeated behaviour, however there have been examples of one maltreatment incident drawing attention because it crosses a line, for example a coach who takes a punishment too far.<sup>65</sup> Incidents such as these should not be defensible on the grounds that they are not a repeated behaviour. The

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<sup>65</sup> Bill Spurr, “St. FX Coach Suspended After Player Lands in Hospital”, *Chronicle Herald* (31Jan 2019).

definition of athlete maltreatment should therefore not be limited by the requirement that the behaviour is repeated.

### **3.4 Maltreatment Subcategories:**

**Institutional maltreatment** describes maltreatment of individuals who are permanently, or temporarily, under the care of any institution which has been given responsibility for them. Competitive sport organizations have received criticism, not just for the most notorious cases of sport-related sexual abuse, but also for institutional maltreatment of athletes through the creation of unhealthy and stressful environments, perpetuating harmful behaviours and ideologies (e.g. severe diet restriction, hyper-sexualization), engaging in discriminatory practices, as well as exposing athletes to psychological, physical, and sexual maltreatment, neglect, over-use injuries and sport violence.<sup>66</sup>

**Sexual maltreatment of** athletes is most commonly referred to as **sexual abuse**, and because the difference in meaning is subtle, and this is the term used almost exclusively in the academic literature on the subject, I will also primarily use this term in order to avoid confusion.

There is no definition for sexual abuse specifically pertaining to athletes, however the Canadian *Criminal Code* provides a series of definitions for sexual offences in Canada. (These were discussed at length in Chapter Two.) **Sexual abuse** can be generally defined as "...any sexual interaction with person(s) of any age that is perpetrated against the victim's will, without consent or in an aggressive, exploitative, manipulative or threatening manner."<sup>67</sup> Sexual abuse may be further categorized as either touching or non-touching in nature.<sup>68</sup>

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<sup>66</sup> Stirling, *supra* note 1.

<sup>67</sup> GD Ryan & SL Lane, *Juvenile Sexual Offending: Causes, Consequences, and Correction* (San Francisco: Jossey-Bass, 1997) at 9.

<sup>68</sup> Dawn D Matthews, ed, *Child Abuse Source Book* (Detroit: Omnigraphics, 2004) at 39.

**Harassment** is sometimes very broadly defined so as to include sexual assault and sexual abuse. Harassment usually occurs in a relationship of trust and power imbalance.<sup>69</sup> The target can be an individual or a group. Harassment represents an infringement of human rights such as discrimination based on: race, religion, gender, sexuality, disability, age or ethnic origin.<sup>70</sup> **Sexual harassment** is any sexualized form of harassment. The Canadian Human Rights Commission defines **harassment** as follows:

Harassment is a form of discrimination. It includes any unwanted physical or verbal behaviour that offends or humiliates you. Generally, harassment is a behaviour that persists over time. Serious one-time incidents can also sometimes be considered harassment.<sup>71</sup>

**Bullying** “includes physical, verbal or psychological attacks or intimidations that are intended to cause fear, distress or harm to the victim. Like abuse and harassment, bullying results from an imbalance of power.”<sup>72</sup> Bullying is usually, but not always, a repeated behaviour.<sup>73</sup> It is most often non-relational and commonly occurs between peers. Bullying can be physical, psychological or social in nature and it is frequently sexualized.<sup>74</sup>

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<sup>69</sup> A Ljungqvist, Margot Mountjoy & Celia Brackenridge, “Consensus Statement: Sexual Harassment and Abuse in Sport” (8 Feb 2007), online: olympic.org <<https://multimedia.olympic.org/pdf/enreport1125.pdf>>.

<sup>70</sup> *Ibid.*

<sup>71</sup> Singh, *supra* note 62.

<sup>72</sup> Stirling, *supra* note 1 at 20.

<sup>73</sup> A Wayne Mackay, “Respectful and Responsible Relationships: There’s No App for That, Report of the Nova Scotia Task Force on Bullying and Cyber Bullying” (Halifax, 2012).

<sup>74</sup> Stirling, *supra* note 1.

The most common form of bullying in sport is **hazing**,<sup>75</sup> but peer athletes have also been accused of many other types of bullying and sexual violence.<sup>76</sup> Hazing is historically part of a sport team initiation rite. These events frequently involve alcohol and sometimes dangerous, unpleasant, sexualized or embarrassing stunts. In spite of efforts to prohibit hazing at many sport clubs and on university teams, the practice still continues and may have a lasting psychological impact on victims.<sup>77</sup>

Most forms of maltreatment are accompanied, or preceded, by psychological maltreatment,<sup>78</sup> with psychological and physical maltreatment sometimes forming part of the **grooming** stage before sexual abuse.<sup>79</sup> Grooming of athletes has been referred to as the “gateway” to athlete sexual abuse.<sup>80</sup> Grooming, or subjection, is sometimes informally called brainwashing. It is defined as: “the process of predisposing [an athlete] to sexual abuse by means of subtle or blatant interactions”.<sup>81</sup> There are four identified grooming stages: targeting; developing trust; isolating; abuse and secrecy.<sup>82</sup>

Grooming may be subtly demonstrated through acts such as giving athletes a ride home, or by building intimacy through the provision of sensitive emotional support.<sup>83</sup> Elite athletes may spend more time with their coaches than with their own parents and some

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<sup>75</sup> *Ibid*; Note: In the case of *R v A, B, and C*, 3 youth were convicted of sexual assault and sexual assault with a weapon, and one was convicted of child pornography for distribution of sexual images. The incident took place as an athletic hazing event in a school locker room. The court placed a portion of the blame on the school culture. See *R v A, B, and C*, 2019 CarswellOnt 21907.

<sup>76</sup> Mountjoy, *supra* note 26.

<sup>77</sup> Curtis Fogel, “Precarious Masculinity and Rape Culture in Canadian University Sport” in Elizabeth Quinlan et al, eds, *Sexual Violence at Canadian Universities: Activism, Institutional Responses, and Strategies for Change* (Waterloo: Wilfred Laurier University Press, 2017) 139; Stirling, *supra* note 1; MacGregor, *supra* note 59; Waterhouse-Watson, *supra* note 59.

<sup>78</sup> Stirling, *supra* note 50 at 178.

<sup>79</sup> Mountjoy, *supra* note 26; Kerr, *supra* note 4 at 5.

<sup>80</sup> *Ibid*.

<sup>81</sup> J Spiegel, *Sexual Abuse of Males: The SAM Model of Theory and Practice* (New York: Routledge, 2003) at 139.

<sup>82</sup> Celia Brackenridge & Kari Fasting, “The Grooming Process in Sport: Narratives of Sexual Harassment and Abuse” (2005) 13:1 *Auto Biography* 33.

<sup>83</sup> Kari Fasting & Trond Svela Sand, “Narratives of Sexual Harassment Experiences in Sport” (2015) *Qualitative Research in Sport, Exercise & Health* 1.



coach-athlete relationships span decades.<sup>84</sup> Intense relationships of this sort may add to athlete vulnerability.<sup>85</sup> This is particularly true in the case of athletes who are at the athletic crossroads Brackenridge calls “the state of imminent achievement”, where athletes have increased vulnerability because they are close to achieving their longstanding goals. Often this is when they are about to move to the elite level in their sport and they will not let anything stand in the way of getting there.<sup>86</sup> Athletes may be particularly at risk if this stage coincides with puberty.

Some athletes do not see themselves as victims during the period of their maltreatment because they have been groomed to think of the relationship as one of caring and any sexual encounters as consensual.<sup>87</sup> Strategic grooming, of other coaches, sport administrators, members of the community and the athlete’s family, increases the perpetrator’s power through the building of widespread loyalty, trust and a strong reputation, all of which ensures the perpetrator’s continued access to athletes.<sup>88</sup>

Perpetrators, whether peer athletes or coaches, tend to be individuals who have power over the athlete victim.<sup>89</sup> Athletes are sometimes restrained from reporting sexual abuse because of threats, manipulation or coercion by the offender.<sup>90</sup> Athletes may also worry about personal repercussions if the sexual abuse becomes public or that they might

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<sup>84</sup> Tschan, *supra* note 1.

<sup>85</sup> *Ibid*; Marshall, *supra* note 27.

<sup>86</sup> Brackenridge, *supra* note 3 at 112 & 117; Kirby, *supra* note 4; Michael Burke, “Obeying Until It Hurts: Coach-Athlete Relationships” (2001) 28:2 J Philosophy Sport 227 at 232 and 235.

<sup>87</sup> Mike Hartill, “The Sexual Abuse of Boys in Organized Male Sports” (2009) 12:2 Men & Masculinities at 228.

<sup>88</sup> Kennedy, *supra* note 23 at 80; Kerry Howey, “Everyone Believed Larry Nassar: The Predatory Trainer May Have Just Taken Down USA Gymnastics. How Did He Deceive So Many for So Long?”, *New York Magazine* (19 November 2018).

<sup>89</sup> Kari Fasting, Celia Brackenridge & G Kjølberg, “Using Court Reports to Enhance Knowledge of Sexual Abuse in Sport: A Norwegian Case Study” (2013) 4 Scandinavian Sport Studies Forum 49. See *R. v. D.C.*, 2020 CarswellOnt 3673. A track and field coach was convicted of sexual assault, assault and assault causing bodily harm to a young athlete. The court found that the coach had exploited the athlete’s Olympic hopes and had used methods of control and isolation to further his position of power. See also *R. v. James* 2012 CarswellMan 144. A hockey coach was found to have coerced young athletes into sexual encounters by telling them that he was their only route to an NHL career.

<sup>90</sup> Kennedy, *supra* note 23 at 74.

experience retaliation for breaking a promise of secrecy.<sup>91</sup> Manipulation of this sort, by a revered and trusted figure, can be devastating for survivors, often creating lasting issues with trust and an ongoing sense of insecurity and fear.<sup>92</sup>

**Psychological maltreatment** includes all forms of emotional maltreatment including neglect. The term psychological maltreatment is broader in scope than emotional abuse or maltreatment because it explicitly encompasses harms other than just emotional harm, for example, damage to self esteem, values, or belief.<sup>93</sup> For this reason, I will use the more general term psychological maltreatment in this thesis. All forms of athlete maltreatment have an underlying psychological element.<sup>94</sup>

Stirling engages the term **emotional abuse**.<sup>95</sup> The terms emotional abuse and psychological maltreatment are similar in meaning, and since the Stirling definition is extensive enough to encompass all types of emotional harm, including damage to self esteem, values and beliefs, I will apply her definition to the broader term, psychological maltreatment. She defines emotional abuse as:

...a pattern of deliberate non-contact behaviours within a critical relationship that has the the potential to be harmful. The intent of a perpetrator to inflict harm is not required in order for a pattern of behaviour to constitute emotional abuse; nor is evidence of the eventual harm inflicted.<sup>96</sup>

Psychological maltreatment behaviours, can be **verbal**, which may be loud, threatening or demeaning oral exhibitions, or **non-verbal**, which may include physical, but non-

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<sup>91</sup> *Ibid.*

<sup>92</sup> Christine Hauser & Maya Salam, “Women Confront Larry Nassar in Court: ‘I Was So Brainwashed Then’”, *The New York Times* (22 January 2018).

<sup>93</sup> Mountjoy, *supra* note 26.

<sup>94</sup> Roberts, *supra* note 4 at 5.

<sup>95</sup> Stirling, *supra* note 1 at 11.

<sup>96</sup> *Ibid.*

contact expressions of abuse, like slamming doors or throwing things. They can also include non-physical, non-verbal behaviours, like isolation and lack of attention, which are a form of psychological maltreatment that overlaps with neglect.<sup>97</sup>

Although psychological maltreatment in sport is a relatively new area of academic study, and one of the problematic behaviours least reported to sport authorities, research suggests that it is the one most frequently experienced.<sup>98</sup> Stafford, Alexander, and Fry report that 75% of respondents, in their study of 6,000 youth from all levels of sport, had been subjected to psychological maltreatment in sport, mostly from coaches.<sup>99</sup>

Historically there has been widespread acceptance of psychological maltreatment behaviours like yelling, fault finding and castigation of athletes, as these were believed to contribute to building athlete toughness and resilience.<sup>100</sup> Athlete acceptance of psychological maltreatment has been associated with the belief that it is necessary for success.<sup>101</sup> Psychological maltreatment is now recognized as a non-productive coaching strategy that can result in significant long term psychological and physical harms.<sup>102</sup> Psychological maltreatment appears to be more severe among elite athletes,<sup>103</sup> but the harm they experience may be lessened during periods when their athletic careers are going well.<sup>104</sup>

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<sup>97</sup> Stirling, *supra* note 50 at 179; L Weymouth & TR Howe, "Psychological Maltreatment", in S Goldstein & JA Naglieri, eds, *Encyclopedia of Child Behavior and Development* (Boston: Springer, 2011).

<sup>98</sup> Kerr, *supra* note 4.

<sup>99</sup> Anne Stafford, Kate Alexander & Deborah Fry, "Playing Through Pain: Children and Young People's Experiences of Physical Aggression and Violence in Sport" (2013) 22:4 *Child Abuse Rev* 287.

<sup>100</sup> Kerr, *supra* note 4 at 3, 7 and 8; Stirling, *supra* note 50 at 180; Gretchen A Kerr & Ashley E Stirling, "Parents' Reflections on their Child's Experiences of Emotionally Abusive Coaching Practices" (2012) 24:2 *J Applied Sport Psychology* 191 at 198.

<sup>101</sup> Ashley Stirling & Gretchen Kerr, "Elite Female Swimmers' Experiences of Emotional Abuse Across Time" (2007) 7 *J Emotional Abuse* at 89.

<sup>102</sup> Kerr, *supra* note 4 at 5; Toftegaard Nielsen *supra* note 3 at 168; Reynolds, *supra* note 57 at 52.

<sup>103</sup> Stirling, *supra* note 50 at 174; Roberts, *supra* note 4 at 5; Gervis, *supra* note 4.

<sup>104</sup> Stirling, *supra* note 109.

Eating Disorders can be a consequence of athlete nutritional neglect, sometimes called nutritional abuse or **nutritional maltreatment**. These behaviours occur more commonly, though not exclusively, in sports where thinness is believed to add to a preferred sport-aesthetic such as in gymnastics or figure skating, or where it can enhance performance, such as in endurance sports, or where there is a specific weight requirement or weight class, such as in weight lifting or rowing.<sup>105</sup>

In 2019, former American champion long distance runner, Mary Cain announced that she had suffered psychological and physical maltreatment from her world-champion coach, Alberto Salazar, head of the formerly renowned Nike Oregon Project. Cain revealed that while under Salazar's guidance as a teenager, she was publicly weighed and shamed for adding pounds. Salazar kept her on a restricted diet which caused her to experience amenorrhea and to consequently suffer broken bones from osteoporosis.<sup>106</sup>

Cain confessed that she became suicidal after a long period of disordered eating and toxic training conditions.<sup>107</sup> When Cain admitted that she had been cutting herself, the Nike Oregon Project coaches made no efforts to provide professional counselling.<sup>108</sup> Cain's story made international headlines, but her abuse is not remarkable. Joan Ryan exposed nutritional abuse among American gymnastics in the 1990s<sup>109</sup> and Laura Robinson highlighted rampant nutritional abuse in female endurance sports in Canada in 2002.<sup>110</sup>

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<sup>105</sup> Anthony Papatomas & David Lavalley, "Athlete Experiences of Disordered Eating in Sport" (2010) 2:3 *Qualitative Research in Sport & Exercise* 354 at 355; DM Garner, LW Rosen & D Barry, "Eating Disorders Among Athletes: Research and Recommendations" (1998) 7:4 *Child Adolescent Psychiatry Clinic NA* 839, online: <<https://pubmed.ncbi.nlm.nih.gov/9894045/>>.

<sup>106</sup> Cain, *supra* note 25; Anne Francis, "Mary Cain Tells NY Times of Abuse by Salazar & NOP" *Canadian Running Magazine* (7 Nov 2019), online: <<https://runningmagazine.ca/the-scene/mary-cain-tells-ny-times-of-abuse-by-salazar-nop/>>; Sarah Lorge Butler, "The Latest in Mary Cain's Allegations Against Nike and Salazar" *Runners' World* (10 Nov 2019), online: <<https://www.runnersworld.com/news/a29750469/mary-cains-allegations-against-nike-and-salazar/>>.

<sup>107</sup> *Ibid*

<sup>108</sup> *Ibid*

<sup>109</sup> Joan Ryan, *Little Girls in Pretty Boxes: The Making and Breaking of Elite Gymnasts and Figure Skaters* (New York: Warner Books 1996) at 53 and 95.

<sup>110</sup> Laura Robinson, *Black Tights* (Toronto; Harper Collins 2002) at 134-140.

Nutritional maltreatment is another understudied area of athlete maltreatment but it is extremely common, potentially fatal, and can have lasting psychological and physical consequences.

**Physical maltreatment** may be any contact or non-contact act that causes physical harm. It has been defined as “non-accidental trauma or physical injury”.<sup>111</sup> The most common physical maltreatment in sport is pushing athletes to train or compete while exhausted, sick or injured.<sup>112</sup> In some cases athletes have been rendered unconscious, ended up in hospital, suffered serious injury, or have died.<sup>113</sup> Extreme coaching behaviours are particularly problematic for child and youth athletes<sup>114</sup> to respond to as they may not understand potential health risks, and the coach’s power over the athlete combined with the difficulty of challenging a respected adult, may effectively remove any ability to refuse the coach’s orders.<sup>115</sup>

Sometimes coaches impose painful or humiliating individual or team punishments.<sup>116</sup> Physical maltreatment through punishment occurs when the punishment is inappropriate, excessive force is used or the duration of the punishment is unreasonable.<sup>117</sup> One such example occurred when an Australian gymnastics coach strapped an athlete to the horizontal bar for thirty minutes as punishment for a sub-par training effort.<sup>118</sup>

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<sup>111</sup> Stirling, *supra* note 1.

<sup>112</sup> Kerr, *supra* note 28 at 5; M Pinheiro et al, “Gymnastics and Child Abuse: An Analysis of Former International Portuguese Female Artistic Gymnasts” (2014) 19:4 Sport Education and Society at 453; Burke, *supra* note 86 at 232; Reynolds, *supra* note 57 at 52.

<sup>113</sup> Kerr, *supra* note 4 at 8. See Ryan, *supra* note 109 at 53 and 95, regarding USA Gymnastics Olympic-hopeful, Julissa Gomez who died in 1991 following a broken neck incurred while competing with an injury and American gymnast Christy Henrich who died in 1994 from complications following years of battling a sport-related eating disorder. See also Reynolds, *supra* note 57 at 52, regarding a Russian gymnast who broke her neck during an Olympic training session.

<sup>114</sup> Reynolds, *supra* note 57 at 56; Burke, *supra* note 86 at 234.

<sup>115</sup> Burke, *supra* note 86 at 234; Toftegaard Nielsen, *supra* note 3 at 169; Stirling, *supra* note 50 at 174.

<sup>116</sup> Spurr, *supra* note 46.

<sup>117</sup> Mathews, *supra* note 36 at 163.; Stirling, *supra* note 1.

<sup>118</sup> Reynolds, *supra* note 57.

Other examples of sport physical maltreatment occur when athletes are discouraged from attending physiotherapy or getting proper medical attention because coaches do not want athletes to sacrifice training time or miss competitions.<sup>119</sup> Some athletes have been known to suffer injuries that lead to drug or alcohol addiction after retirement.<sup>120</sup> This has been a particular problem in sports associated with repeated concussions. Kerr and Wilson found that 35% current and 53% retired elite athletes said sport injuries continue to impact their quality of life; 28% current athletes and 40% retired athletes lost support or funding due to injury; and 63% were inadequately supported for injuries after retirement.<sup>121</sup>

Concussion protocols and medical treatments have greatly improved,<sup>122</sup> however, 20% of current and 29% of retired athletes live with concussion-related mental health concerns.<sup>123</sup> Sport organizations have typically not concerned themselves with the longterm health and wellbeing of retired athletes and legal actions for post-career injury compensation have been infrequent and mostly unsuccessful.<sup>124</sup>

Like psychological maltreatment, physical maltreatment of athletes is infrequently reported to authorities and has not been the subject of rigorous academic study,<sup>125</sup> consequently physical maltreatment prevention strategies are lacking.<sup>126</sup> Recent cases of coaches being fired or suspended for psychological and physical maltreatment may

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

<sup>120</sup> “‘Derek's Life Meant Something': Joanne Boogaard Vows to Keep Fighting NHL After Son's Death”, *CBC News*, 02 Oct 2016, online: <<https://www.cbc.ca/news/canada/saskatoon/derek-boogaard-parents-lawsuit-against-nhl-hearing-chicago-1.3787343>>.

<sup>121</sup> Kerr, *supra* note 4.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> *Supra* note 158.

<sup>125</sup> Kerr, *supra* note 4 at 10; Donnelly, *supra* note 2; Roslyn Kerr & Gretchen Kerr, “Promoting Athlete Welfare: A Proposal for an International Surveillance System” (2019) *Sport Mgmt Rev* 2, online: <<https://doi.org/10.1016/j.smr.2019.05.005>>; Reynolds, *supra* note 57.

<sup>126</sup> Celia Brackenridge et al, “Protecting Children from Violence in Sport: A Review With a Focus on Industrialized Countries” Unicef (2010), online: < [https://www.unicef-irc.org/publications/pdf/violence\\_in\\_sport.pdf](https://www.unicef-irc.org/publications/pdf/violence_in_sport.pdf)>.

indicate increasing public awareness on these issues.<sup>127</sup> Physical maltreatment is usually considered the most identifiable form of athlete maltreatment because the act and the harm caused are both often highly visible, but it remains one of the least reported forms of maltreatment.<sup>128</sup>

Athletes are widely celebrated for toughness in pushing through pain and injury, as was the case with Olympic medal winners American Kerri Strug and Canadian Silken Laumann. Strug won a medal in Olympic gymnastics competing with badly torn ligaments and Laumann became a national hero, winning an Olympic medal in single sculls after a training accident and surgery.<sup>129</sup> The media consistently mythologizes such feats, which unfortunately perpetuates a cultural expectation of super-human toughness in sport. Sometimes this can mean valuing winning and celebrating victory while sacrificing athlete health and wellbeing. This practice publicly legitimizes physical maltreatment in sport.<sup>130</sup>

### **3.5 The Academic Literature on Sport Maltreatment: A Thematic Review**

#### **3.5.1 Historic Male Dominance and Masculine Hegemony in Sport**

Male dominance was one of four key emergent themes drawn from the qualitative data, which will be discussed in Chapter Five. The four sub-themes all influence the overarching theme of sport culture, and each of the themes contributes to the perpetuation of athlete maltreatment. Athlete respondents indicated that in many cases they believed

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<sup>127</sup> In February 2019, St Francis Xavier University, in Antigonish Nova Scotia, suspended their women's basketball coach for the rest of the 2019 season for imposing unnecessarily harsh disciplinary measures on an athlete. "Injury resulted from improper supervision of the performance of an on-court exercise undertaken as part of a disciplinary measure," according to St. FX's Director of Athletics and Recreation. See Bill Spurr, "St. F.X. Coach Suspended After Player Lands in Hospital", *Chronicle Herald* (31 Jan 2019); See also Nick Martin, "Former Penn State Gymnasts Detail Alleged Abuse by Coaches", *Washington Post* (31 May 2016).

<sup>128</sup> Stirling, *supra* note 1 at 12.

<sup>129</sup> Silken Laumann with Sylvia Fraser, *Unsinkable: My Untold Story* (Toronto: HarperCollins 2014); Kerri Strug with John P Lopez, *Landing on My Feet: A Diary of Dreams* (Kansas City, Mo: Andrews McPeel, 1997).

<sup>130</sup> Reynolds, *supra* note 57.

their maltreatment was connected to a historical culture of masculine hegemony in sport. Their statements are well supported by the academic literature.

Sport culture is historically masculine,<sup>131</sup> militaristic, heterosexual<sup>132</sup> and hierarchical.<sup>133</sup> Messner and Sabo call sport:

...an institution created by and for men... [that] has served to bolster a sagging ideology of male superiority and has thus helped to reconstitute masculine hegemony in the 19th and 20th century [sic].<sup>134</sup>

Sport has traditionally been where boys learn values associated with hegemonic masculinity and heterosexuality.<sup>135</sup> Sport provides a perfect setting for athlete sexual abuse and other forms of maltreatment because normal social practices do not apply and behaviour that is otherwise unacceptable often goes unchallenged.<sup>136</sup>

Sport coaches sometimes encourage a lack of empathy for opponents<sup>137</sup> and sport culture frequently normalizes aggression and violence.<sup>138</sup> These principles continue to be

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<sup>131</sup> Note: Although the definition of masculinity is subjective and varies among different nations, cultures, time periods and individuals, I am using the word "masculine" in its socially-constructed traditional western sense.

<sup>132</sup> Kari Fasting, Celia Brackenridge, & Jorunn Sundgot-Borgen, "Prevalence of Sexual Harassment among Norwegian Female Elite Athletes in Relation to Sport Type" (2004) 39:4 *Int Rev Soc Sport* 373 at 374 and 381.

<sup>133</sup> Kitrina Douglas & David Carless, "Performance Discovery and Relational Narratives Among Women Professional Tournament Golfers" (2006) 15:2 *Women Sport & Phys Activity J* at 14; Burke, *supra* note 86 at 230.

<sup>134</sup> Fasting (2003), *supra* note 3 at 93; Michael Messner & Donald Sabo, eds, *Sport, Men and the Gender Order* (Champaign, IL: Human Kinetics, 1994) at 9.

<sup>135</sup> Brackenridge, *supra* note 3 at 287; Hartill, *supra* note 87 at 234 and 238; Brackenridge, *supra* note 28 at 333.

<sup>136</sup> Tschan, *supra* note 1.

<sup>137</sup> MacGregor, *supra* note 59 at 64; Waterhouse-Watson, *supra* note 59.

<sup>138</sup> Robinson claims that Canadian junior hockey programs promote a dysfunctional focus on masculine aggression and reinforce stereotypical gender roles. See Laura Robinson, *Crossing the Line: Sexual Harassment and Abuse in Canada's National Sport* (Toronto: McClelland and Stewart, 1998) at 56; Burke, *supra* note 86 at 230; MacGregor, *supra* note 59 at 64; Waterhouse-Watson, *supra* note 59.



promoted in sport today through the celebration of toughness, denial of pain and playing through injury<sup>139</sup> as well as in sexualized "locker room talk" and through the perpetuation of racism and homophobia.<sup>140</sup> Hegemonic masculine ideals may also be expressed through acts of sexual violence by athletes.<sup>141</sup>

Feminist academics have suggested motivation and opportunity for sexual abuse, which includes child sexual abuse and athlete sexual abuse, are not individually created but are the results of socially constructed masculinity and institutional patriarchy.<sup>142</sup> Seymour emphasizes that individuals must still be held accountable for their actions.<sup>143</sup> Connell places male violence in a cultural context.<sup>144</sup> She says that violence is inevitable when there is societal inequity and a culture of male privilege that is resistant to change.<sup>145</sup> While many social institutions have consciously stopped engaging in biological favouritism, sport has persisted in defining itself through sexual segregation and the rigorous protection of masculine privilege<sup>146</sup> which has created and sustained an environment where non-conforming athletes are vulnerable to maltreatment.

Studies have shown that women are more likely to be harassed in the workplace when they are part of the minority in a traditionally male environment.<sup>147</sup> As with the professional workplace, sport has been a predominantly male, heterosexual domain for

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<sup>139</sup> Burke, *supra* note 86 at 232; Hartill, *supra* note 87 at 229; Brackenridge, *supra* note 3 at 87; MacGregor, *supra* note 56 at 64; Waterhouse-Watson, *supra* note 59.

<sup>140</sup> Hartill, *supra* note 87 at 238; Brackenridge, *supra* note 28 at 330.

<sup>141</sup> Burke, *supra* note 82 at 230; J Neimark, "Out of Bounds: The Truth About Athletes and Rape" in DS Eitzen, ed, *Sport in Contemporary Society: An Anthology*, 5th ed (New York: St Martin's Press, 1996) at 209; MacGregor, *supra* note 59 at 64; Waterhouse-Watson, *supra* note 59.

<sup>142</sup> Anne Seymour, "Aetiology of the Sexual Abuse of Children: An Extended Feminist Perspective", (1998) 21:4 Women's Studies Int Forum, 415 at 425.

<sup>143</sup> *Ibid* at 418.

<sup>144</sup> Raewyn Connell, *Masculinities*, 2nd ed (Cambridge: Polity Press, 1995) at 82.

<sup>145</sup> *Ibid* at 83.

<sup>146</sup> Brackenridge, *supra* note 28 at 331.

<sup>147</sup> Barbara Gutek, *Sex and the Workplace: The Impact of Sexual Behavior and Harassment on Women, Men, and Organizations*, (San Francisco: Jossey-Bass, 1985).

hundreds of years. Some female athletes have said that sexual harassment in sport feels like an ongoing message that they still do not belong.<sup>148</sup> Vertommen et al. reported that members of minority groups are more susceptible to sexual violence in sport and that LGBTQ, ethnic minorities and para-athletes are particularly vulnerable.<sup>149</sup>

This may result from a perceived threat to the traditional heterosexual masculine sport identity by members of minority groups and the perceived threat could be exacerbated when those minority group representatives experience athletic success.<sup>150</sup> Perpetrators may also be empowered by a belief that members of minority groups are less likely to report abuses and less likely to be believed when they do.<sup>151</sup> Traditionally masculine sports and their organizations may be more historically and habitually tolerant of racism, sexism and homophobia, and therefore authorities who subscribe to this way of thinking can be less likely to intervene to stop discriminatory behaviour.<sup>152</sup>

In addition to sometimes feeling excluded, and powerless over their athletic destiny, females athletes in particular may also experience sexualization by coaches, sport authority figures and the general public.<sup>153</sup> Advertising, media and social conditioning in western society all contribute to the sexualization of young women and girls so that this perspective often becomes the norm.<sup>154</sup> Finkelhor says the social acceptance of female hyper-sexualization has the potential to make child sexual exploitation seem more natural and acceptable.<sup>155</sup>

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<sup>148</sup> Fasting (2003), *supra* note 3 at 93.

<sup>149</sup> Tine Vertommen et al. "Interpersonal Violence Against Children in Sport in the Netherlands and Belgium" (2016) 51 *Child Abuse & Neglect* 223.

<sup>150</sup> Brackenridge, *supra* note 3 at 91; Fasting, *supra* note 132 at 384.

<sup>151</sup> Bjørnseth, *supra* note 39.

<sup>152</sup> Fasting, *supra* note 132 at 383.

<sup>153</sup> Brackenridge, *supra* note 3 at 97.

<sup>154</sup> Finkelhor (1982), *supra* note 12 at 101.

<sup>155</sup> Finkelhor (1984), *supra* note 12 at 13.

Qualitative studies report that athletes often have difficulty sharing or reporting their sport sexual harassment or maltreatment experiences and this could significantly impact statistics on prevalence.<sup>156</sup> The reluctance may be because of shame, guilt, questions regarding personal sexuality, belief that the maltreatment was not a big deal, or because the athlete is protecting the perpetrator.<sup>157</sup> Athletes, and in particular child athletes, may not report sexual harassment and maltreatment because they are unable to determine whether the behaviour was inappropriate.<sup>158</sup> Statistics indicate that girls experience sport harassment and sexual abuse more frequently than boys,<sup>159</sup> but boys have been studied less often than girls<sup>160</sup> and they are even more unlikely to report.<sup>161</sup> Hartill recommends further research on the specific maltreatment experiences of male athletes.<sup>162</sup>

A study by Fasting et al. suggests the type of sport, whether it is an individual or team sport, and the amount of clothing worn, do not significantly impact rates of sport sexual harassment and sexual abuse.<sup>163</sup> Research shows a direct correlation between coaches who demand total obedience, which is a form of psychological maltreatment, and athlete sexual abuse.<sup>164</sup> Controlling coaching behaviours may include strict supervision of diet, regular weighing<sup>165</sup> and interference in the athlete's personal, familial, academic and

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<sup>156</sup> Mike Hartill, "Exploring Narratives of Boyhood Sexual Subjection in Male-Sport" (2014) 31:1 *Sociology of Sport* 23.

<sup>157</sup> Fasting, *supra* note 83.

<sup>158</sup> Bjørnseth, *supra* note 39.

<sup>159</sup> Trisha Leahy, Grace Pretty & Gershon Tenenbaum, "Prevalence of Sexual Abuse in Organized Competitive Sport in Australia" (2002) 8:2 *J Sexual Aggression* at 16; Fasting, *supra* note 89; Vertommen, *supra* note 149.

<sup>160</sup> Hartill, *supra* note 87 at 228.

<sup>161</sup> R Alaggia, "Disclosing the Trauma of Child Sexual Abuse: A Gender Analysis" (2005) 10:5 *Journal of Loss & Trauma* at 453; Vertommen, *supra* note 149 at 223.

<sup>162</sup> Hartill, *supra* note 87 at 225.

<sup>163</sup> Note: This is noteworthy because there can be a tendency to stigmatize certain sports if they are perceived to pose a higher than average risk for sexual abuse. Blaming sport sexualization on revealing athletic clothing sometimes creates a false sense of security in sports considered "lower risk". It can also be used as justification for not emphasizing sexual abuse prevention in sports that are perceived as less vulnerable environments. See Fasting, *supra* note 132 at 374.

<sup>164</sup> Stirling, *supra* note 4 at 229; Reynolds, *supra* note 57 at 56; Kerr, *supra* note 4 at 8; Kennedy, *supra* note 23 at 77.

<sup>165</sup> Kerr, *supra* note 4 at 8; Toftegaard Nielsen, *supra* note 3 at 169; Reynolds, *supra* note 57 at 51.

sexual lives.<sup>166</sup> An elite athlete sexual abuse survivor in Australia described her total loss of control over her life as like being in a cult.<sup>167</sup>

The vast majority, but not all, of sport sexual abuse perpetrators are male.<sup>168</sup> 98% of offenders are coaches, teachers or instructors.<sup>169</sup> A study by Vertommen showed 56% of respondents identified more than one perpetrator.<sup>170</sup> In six out of seven studies in their literature review, Bjørnseth and Szabo found coaches were identified as perpetrators of sexual abuse.<sup>171</sup> In the Fasting study, court records revealed coaches as perpetrators in eleven out of fourteen cases.<sup>172</sup> In the Vertommen study, 19% of perpetrators were coaches and there tended to be a significant age difference between athlete and coach.<sup>173</sup> Research by both Fasting and Hartill similarly identified significant age differences between coach perpetrators of sexual abuse and athlete complainants.<sup>174</sup> When coaches were the perpetrators, Vertommen found the level of sexual abuse was increased.<sup>175</sup>

The Vertommen study used a broad definition of interpersonal violence that included forms of maltreatment such as hazing, bullying, and other sexualized sport violence. It indicated that in 45% of cases the perpetrator was a peer athlete.<sup>176</sup> This suggests that

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<sup>166</sup> Stirling, *supra* note 4 at 228; Burke, *supra* note 86 at 234; Toftegaard Nielsen, *supra* note 3 at 169; Kennedy, *supra* note 23 at 73; Brackenridge, *supra* note 3 at 15.

<sup>167</sup> Burke, *supra* note 86 at 231; K Pratt, producer, “Deep Water” (1997) *60 Minutes*, Melbourne Australia.

<sup>168</sup> Celia Brackenridge et al, “Protecting Children from Violence in Sport: A Review With a Focus on Industrialized Countries” Unicef (2010), online: < [https://www.unicef-irc.org/publications/pdf/violence\\_in\\_sport.pdf](https://www.unicef-irc.org/publications/pdf/violence_in_sport.pdf)>; Hartill, *supra* note 87 at 226; Fasting, *supra* note 83.

<sup>169</sup> Celia Brackenridge et al, “The Characteristics of Sexual Abuse in Sport: A Multidimensional Scaling Analysis of Events Described in Media Reports” (2008) 6:4 *International Journal of Sport and Exercise Psychology* 385 at 395.

<sup>170</sup> Tine Vertommen et al, “Profiling Perpetrators of Interpersonal Violence Against Children in Sport Based on a Victim Survey” (2017) 63 *Child Abuse & Neglect* 172.

<sup>171</sup> Bjørnseth, *supra* note 39.

<sup>172</sup> Fasting, *supra* note 89.

<sup>173</sup> Tine Vertommen et al, “Long-Term Consequences of Interpersonal Violence Against Children in Sport” (2017) 51:4 *British Journal of Sports Medicine* at 405.

<sup>174</sup> Fasting, *supra* note 83; Hartill, *supra* note 87.

<sup>175</sup> Vertommen, *supra* note 173 at 405.

<sup>176</sup> Note: This information was based on the subjective self reporting of athletes in an online survey relating to alleged incidents of sexual abuse and interpersonal violence. See Vertommen, *supra* note 170 at 172.

male athletic peers may be the primary offenders when sexual violence in sport is more broadly defined.<sup>177</sup> Bjørnseth and Szabo determined that at elite competition levels, perpetrators of sexual abuse and harassment tend to be coaches, while at lower levels of competition, perpetrators are more likely to be peers.<sup>178</sup> This was confirmed by Alexander et al. in their study.<sup>179</sup>

Although the ratio of male to female athletes on a team is not statistically recognized as a factor increasing the likelihood of sexual harassment, bullying or maltreatment in sport,<sup>180</sup> women who compete in traditional male sports often feel undervalued as athletes<sup>181</sup> and are more likely to be subjected to harassment from male sport peers as well as from individuals outside of their sport.<sup>182</sup> Elite athletes reportedly experience sexual harassment in sport in greater numbers than athletes competing at lower sport levels,<sup>183</sup> and older athletes report more experiences of sexual harassment and abuse than younger athletes.<sup>184</sup>

Kerr and Wilson found that 64% of current Canadian elite athletes and 48% of retired Canadian elite athletes complained of unequal treatment.<sup>185</sup> Although many other institutions such as educational institutions and the professional work place have had to recognize and address equality issues,<sup>186</sup> sport culture has been slow to embrace concepts

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<sup>177</sup> *Ibid*; Vertommen, *supra* note 173 at 405; Kirby, *supra* note 4 at 46.

<sup>178</sup> Bjørnseth, *supra* note 39.

<sup>179</sup> Kate Alexander & Anne Stafford, *Children and Organised Sport* (Edinburgh: Dunedin Academic Press, 2011) at 16.

<sup>180</sup> *Ibid*.

<sup>181</sup> Brackenridge, *supra* note 3 at 70.

<sup>182</sup> Fasting, *supra* note 132 at 381.

<sup>183</sup> Burke, *supra* note 86 at 233; Leahy, *supra* note 159 at 26; Alexander, *supra* note 179 at 16; Bjørnseth, *supra* note 39; Vertommen, *supra* note 149 at 223.

<sup>184</sup> Note: The higher levels of sexual harassment reported by older athletes could be the result of their greater number of years in sport creating more opportunity for incidents. It could also be that older athletes have a clearer understanding of sexual harassment issues, or that they are more willing and able to speak about them. See Fasting (2003), *supra* note 3 at 93.

<sup>185</sup> Kerr, *supra* note 4.

<sup>186</sup> *Crete v Aqua-Drain Sewer Services Inc*, 2017 HRTO 354.

of equality and inclusion<sup>187</sup> and thus sport has continued to perpetuate what Brackenridge and others refer to as a “chilly climate” for anyone not conforming to the norm.<sup>188</sup> Brackenridge believes this is a dangerous approach, and she, like Connell and Seymour, suggests the essence of the problem is in its cultural context, in this case, “the gendered constitution of sport itself”.<sup>189</sup>

### **3.5.2 Insufficient Public and Sport Specific Education on Issues of Athlete**

#### **Maltreatment**

The second theme to emerge from the athlete respondent data was the belief that there is insufficient education on issues of athlete maltreatment at all levels of sport. Athletes felt that lack of maltreatment education contributes to the sexualization of sport, encourages lack of maltreatment reporting, leads to support for coaches over athletes in many maltreatment cases, and normalizes many common forms of athlete maltreatment. The academic literature supports these impacts.

Sport is said to develop strong bodies and mental character while teaching the values of hard work, team-play and the industrious pursuit of longterm goals.<sup>190</sup> Considering these favourable associations with sport,<sup>191</sup> it is perhaps not surprising that some politicians, parents, coaches and sport administrators have had trouble accepting that sport can be associated with serious harm to athletes.<sup>192</sup> German sport organizations had a negative reaction to early studies on sexual abuse in sport in the 1990s. Their fears of reputational

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<sup>187</sup> Celia Brackenridge, “Women and Children First? Child Abuse and Child Protection in Sport” (2010) 7:3 *Sport in Society* 322 at 331.

<sup>188</sup> Brackenridge, *supra* note 3 at 31.

<sup>189</sup> *Ibid* at 238.

<sup>190</sup> Vertommen, *supra* note 149 at 223; Hartill, *supra* note 87 at 234.

<sup>191</sup> Hartill, *supra* note 87 at 226 and 229.

<sup>192</sup> Burke, *supra* note 86 at 227; Jay Coakley, “Assessing the Sociology of Sport: On Cultural Sensibilities and the Great Sport Myth” (2015) 50: 4/5 *International Review for the Sociology of Sport* Article Information at 402; Hartill, *supra* note 87 at 234; Brackenridge, *supra* note 3 at 237.

damage produced years of inaction on athlete maltreatment.<sup>193</sup> As one of Sheldon Kennedy's former National Hockey League (NHL) teammates explained, "If you don't want to believe it, you won't see it."<sup>194</sup>

Qualitative and quantitative studies in the last twenty-five years have deepened academic understanding on sport sexual abuse.<sup>195</sup> Understanding why, where and how sexual abuse of athletes happens contributes to prevention strategies and policy development.<sup>196</sup> There remains nevertheless, a lack of research on the other forms of athlete maltreatment, significant misconceptions, widespread misunderstanding on legal issues,<sup>197</sup> insufficient discussion on the gender-based nature and structure of sport<sup>198</sup> and in some sport organizations, ongoing denial and resistance to change.<sup>199</sup> Education is frequently suggested as the key to cultural change.<sup>200</sup>

Education may not be enough to overcome existing belief systems however. It is still suggested that cases of athlete maltreatment are rare and media stories overblown.<sup>201</sup> A

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<sup>193</sup> Bettina Rulofs, "Assessing the Sociology of Sport: On Gender-based Violence and Child Maltreatment in Sport" (2014) 50:4-5 *International Review for the Sociology of Sport* 580 at 581.

<sup>194</sup> Robinson, *supra* note 138 at 176.

<sup>195</sup> Helen Owton, *Sexual Abuse in Sport: A Qualitative Case Study* (London: Palgrave Macmillan, 2016); Brackenridge, *supra* note 3; Kerr, *supra* note 4; Fasting, *supra* note 83; Alexander *supra* note 179; Hartill, *supra* note 87.

<sup>196</sup> Kirby, *supra* note 4; Fasting (2003), *supra* note 3 at 91; Vertommen, *supra* note 170 at 172.

<sup>197</sup> Curtis Fogel & Chadd Sine, "Public Perceptions of the Legal Handling of Sexual Violence in Youth Sport in Canada: An Unobtrusive analysis of the Graham James Case" (2013) 2:1 *Int L Research* 116 at 121; Celia Brackenridge, "Myths and Evidence - Learning from our Journey", Keynote Address delivered at the Conference 'How Safe is Your Sport', Coventry Sports Foundation and the NSPCC Child Protection in Sport Unit (25 February 2010).

<sup>198</sup> Fogel, *supra* note 197 at 117.

<sup>199</sup> Mountjoy, *supra* note 26 at 1019; Rulofs, *supra* note 193 at 581; Burke, *supra* note 86 at 227; Coakley, *supra* note 192 at 402; Hartill, *supra* note 87 at 234; Brackenridge, *supra* note 3 at 227 and 237; David, *supra* note 13 at 98.

<sup>200</sup> Deborah L Brake, "Going Outside Title IX to Keep Coach-Athlete Relationships in Bounds" (2012) 22:2 *Marquette Sports L Rev* 395; Katherine Hampel, "Whose Fault is it Anyway? How Sexual Abuse Has Plagued the United States Olympic Movement and Its Athletes" (2019) 29:2 *Marquette Sports L Rev* 547; Julie Novkov, "Law, Policy, and Sexual Abuse in the #MeToo Movement: USA Gymnastics and the Agency of Minor Athletes" (2019) 40:1 *J Women Politics & Policy* 42; Kirke, *supra* note 23.

<sup>201</sup> Dean Garratt, Heather Piper & Bill Taylor, "'Safeguarding' Sports Coaching: Foucault, Genealogy and Critique" (2013) 18:5 *Sport, Ed & Society* 615 at 627.

Canadian study by Parent and Demers indicated that sport organizations often believe nothing more could have been done to prevent maltreatment or abuse in their sport,<sup>202</sup> and that it is better not to openly discuss maltreatment issues because that may suggest there is a problem at the organization.<sup>203</sup>

Parent and Demers concluded that sport organizations often see maltreatment prevention as a burden.<sup>204</sup> They found that inaction on maltreatment by representatives of sport organizations could often be related back to internal negative views at the sport authority. When those in leadership positions trivialized athlete maltreatment concerns, complaints of this nature became low priority and few resources were directed toward the matter.<sup>205</sup> Brackenridge stresses that as long as sport organizations see maltreatment protections as inconvenient, little change will take place.<sup>206</sup>

After many years of blaming homosexuality, celibacy, lack of social morality in the community or the character of individual offenders, the culture of the church itself is now increasingly recognized, by many, as the predominant influential factor with respect to sexual abuse of children in the Catholic church. As Sipe says, “Culture trumps reason every time”.<sup>207</sup>

That is to say, regardless of training, screening, education and carefully worded policy, if an organization has leadership that trivializes maltreatment issues, a structure that creates opportunity for maltreatment and sexual abuses, and an organizational culture that perpetuates, turns a blind eye and excuses these behaviours, the maltreatment and sexual abuses will undoubtedly continue. In addition to the educational challenges associated

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<sup>202</sup> Sylvie Parent & Guylaine Demers, “Sexual Abuse in Sport: A Model to Prevent and Protect Athletes” (2011) 20 *Child Abuse Rev* at 125.

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid* at 126.

<sup>205</sup> *Ibid* at 125.

<sup>206</sup> *Ibid* at 126.

<sup>207</sup> A W Richard Sipe, “Mother Church and the Rape of Her Children”, in Thomas G Plante & Kathleen L McChesney, eds, *Sexual Abuse in the Catholic Church: A Decade of Crisis, 2002-2012 (Abnormal Psychology)* 1st Ed (Santa Barbara, California: Praeger, 2011) at 117.



with changing the existing sport culture, significant education is also required to address misunderstandings with respect to the laws governing consent, sexual assault and sexual exploitation.<sup>208</sup>

Athletes, administrators, families and coaches often accept the existence of a longstanding culture of gender discrimination and hyper-sexuality as part of elite sport. An athlete study by Toftegaard Nielsen showed that equal numbers of male and female athletes reported exposure to sexist comments, and 70% male, versus 50% female, reported exposure to sexualized humour by a coach.<sup>209</sup> Parties will often become desensitized to sexualization and discrimination when exposed to regular, repeated demonstrations of this kind of inappropriate behaviour in their sport.<sup>210</sup> For example, if respected coaches and senior athletes routinely participate in sexualized humour, derogatory comments or inappropriate touching, junior athletes are unlikely to resist or to lodge an official complaint.<sup>211</sup>

The understanding that sport coaching may require intimate touching of athletes by coaches creates a barrier to potential complaints because of the resulting uncertainty about boundaries and impropriety.<sup>212</sup> In the elite sport environment, intimate touching of athletes' bodies by coaches during training,<sup>213</sup> and athletes wearing minimal amounts of clothing, are frequently accepted as a normal part of training and competing.<sup>214</sup> Some athletes have said they feel disassociated from their physical bodies because they primarily perceive of their bodies as athletic tools.<sup>215</sup> This can have the effect of

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<sup>208</sup> Burke, *supra* note 86 at 232.

<sup>209</sup> Toftegaard Nielsen, *supra* note 3 at 165.

<sup>210</sup> Burke, *supra* note 86 at 235

<sup>211</sup> Toftegaard Nielsen, *supra* note 3 at 178; Brackenridge, *supra* note 3 at 211.

<sup>212</sup> Sylvie Parent & Karim El Hlimi, "Sexual Abuse of Young People in Sport", online: <<https://inspq.qc.ca/sexual-assault/fact-sheets/sexual-abuse-young-people-sport>>.

<sup>213</sup> Tschan, *supra* note 1.

<sup>214</sup> Burke, *supra* note 86 at 231; Toftegaard Nielsen, *supra* note 3 at 178.

<sup>215</sup> Burke, *supra* note 86 at 231.

removing traditional barriers so that revealing outfits, and inappropriate forms of touching, seem perfectly normal.<sup>216</sup>

Some academics have defended the practice of physical touching during coaching as essential and suggest recent safe sport guidelines are confusing and prevent them from doing their jobs properly,<sup>217</sup> while others believe that lessons can be effectively borrowed from the medical profession so that coaches will learn to ask first before touching and to only touch an athlete when necessary and when another adult is present.<sup>218</sup> The cultural normalization of coaches touching athletes in sport has meant that athletes often tolerate treatment that would elsewhere be considered unacceptable.<sup>219</sup> Athletes themselves often do not recognize the maltreatment until many years later.<sup>220</sup>

### **3.5.3 Distorted Priorities Within Sport**

The third theme drawn from the athlete respondent data was that sport priorities are often distorted. Athlete respondents felt that sport organizations and coaches frequently put a greater emphasis on athletic success than on athlete wellbeing. The literature is consistent with this belief.

Jay Coakley calls the financially driven business of modern high performance sport “the great sport myth”.<sup>221</sup> Corporate, government and private sponsors support winning teams and individuals. Invitations to increasingly high profile competitions follow successful

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<sup>216</sup> *Ibid*; Toftegaard Nielsen, *supra* note 3 at 178.

<sup>217</sup> Heather Piper, Dean Garratt & Bill Taylor, “Child Abuse, Child Protection, and Defensive ‘Touch’ in PE Teaching and Sports Coaching” (2013) 18:5 Sport Ed & Society 583; Garratt, *supra* note 201 at 615.

<sup>218</sup> V Aravind, V Krishnaram & Z Thasneem, “Boundary Crossings and Violations in Clinical Settings” (2012) 34:1 Indian Journal of Psychological Medicine 21; Elad Schiff et al, "Development of Ethical Rules for Boundaries of Touch in Complementary Medicine – Outcomes of a Delphi Process” (2010) 16:4"Complementary Therapies in Clinical Practice 194.

<sup>219</sup> Burke, *supra* note 86 at 235; Fasting (2003), *supra* note 3 at 93; Stirling, *supra* note 50 at 179.

<sup>220</sup> Kerr, *supra* note 4 at 5.

<sup>221</sup> Coakley, *supra* note 192; Hartill, *supra* note 87 at 234.

results, and coaches may become celebrities along with winning athletes.<sup>222</sup> The problem is that the often-shared athlete/coach dream of money and celebrity frequently requires prioritizing winning above everything else.<sup>223</sup>

Athletes, coaches and parents who buy into this sport dream may come to accept emotionally, physically and even sexually abusive coaching behaviour as part of what it takes to be an elite athlete because they are so deeply invested and so focused on the end goal.<sup>224</sup> Brackenridge says that it can be challenging for peers to accept that a respected member of their team is guilty of athlete sexual abuse or maltreatment, and sometimes it is well-known that there is inappropriate behaviour by a coach but a conscious decision may be made to remain silent in order to protect the possibility of winning medals.<sup>225</sup>

Coaches have a duty not to abuse their power,<sup>226</sup> yet many commonly accepted coaching methods are not in the best interests of the athlete.<sup>227</sup> Winning coaches are rarely challenged even if their tactics include pushing unreasonable boundaries.<sup>228</sup> The drive to win can lead athletes, parents and sport professionals to accept or overlook various forms of athlete maltreatment,<sup>229</sup> exposing athletes to longterm harms and creating an environment where athletes are vulnerable to sexual abuse.<sup>230</sup>

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<sup>222</sup> “Meet the Coaches Behind the World's Best Olympic Teams”, *BBC Sport* (2012), online: <<https://www.bbc.com/sport/olympics/19253531>>.

<sup>223</sup> Coakley, *supra* note 192; Douglas, *supra* note 133 at 14; Alexander, *supra* note 179 at 34.

<sup>224</sup> Toftegaard Nielsen, *supra* note 3 at 178.

<sup>225</sup> Brackenridge, *supra* note 3 at 168; Ryan, *supra* note 109.

<sup>226</sup> Brackenridge, *supra* note 3 at 50; Alexander, *supra* note 179 at 28.

<sup>227</sup> Stirling, *supra* note 4 at 229; Kerr, *supra* note 4 at 8.

<sup>228</sup> Stirling, *supra* note 4 at 232; Kerr, *supra* note 4 at 8; Ryan, *supra* note 109 at 53 and 95; Kerr, *supra* note 138 at 198.

<sup>229</sup> Note: Gymnastics coach, Rick Newman says he didn't realize it was harmful to call young girls idiots and imbeciles. He adds, “They were willing participants. I always felt as a coach I couldn't leave any stone unturned.” See Ryan, *supra* note 109 at 216.

<sup>230</sup> David, *supra* note 13 at 53-61; Kerr, *supra* note 4 at 8; Hartill, *supra* note 87 at 237.

Choi Young-ae, the Chair of South Korea's Human Rights Commission investigation into sexual abuse in sport, says:

Physical and sexual violence in [South Korean] sports does not happen incidentally, but is generated consistently under a structure. A culture that puts medals and other awards over everything else has been exonerating violent behaviours and such violence has been closely associated with the sexual violence that occurs.<sup>231</sup>

Choi Young-ae's statement describes not only the state of athlete maltreatment and athlete sexual violence in South Korea, but the international problem of systemic sport maltreatment and sexual abuse. The vast amounts of money associated with major international sporting events have bolstered existing hierarchical structures while ignoring humanitarian principles.<sup>232</sup> Not only is this environment conducive to athlete maltreatment, it has also resulted in a growing market for the human trafficking of young athletes to compete in lucrative international sports.<sup>233</sup>

#### **3.5.4 Self-Regulation of Sport Organizations**

The fourth and final theme identified by athlete respondents in the qualitative study was the issue of sport self-regulation. Athlete respondents all felt that the insular nature of sport organizations, and the lack of an independent authority to investigate and resolve complaints, makes it difficult for athletes to come forward with concerns. When athletes

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<sup>231</sup> Associated Press, *supra* note 34.

<sup>232</sup> Brackenridge, *supra* note 3 at 334.

<sup>233</sup> Peter Donnelly & Leanne Petherick, "Workers' Playtime? Child Labour at the Extremes of the Sporting Spectrum" (2004) 7:3 *Sport in Society* 301 at 303. Note: Trafficking of young athletes has become a serious problem in some sports, notably in international football where youth, with dreams of being football stars, are taken from their parents at considerable expense to the family, with the hope that they can become stars in the business of international football. Most often they are abandoned in cities far away from their homes. The other particularly problematic area for athlete trafficking happens with camel jockeys, who are often taken from their homes, as very young children, to race camels. They are kept in poor conditions, starved so that they do not grow or gain weight, and often physically and sexually abused. See Donnelly, *supra* note 233 at 315.

did follow their sport regulations to complain about maltreatment issues, the results were unsatisfactory. The political, legal and efficiency merits and contra-indications for self-regulation were discussed in Chapter 2. This section will look at the human cost of sport self-regulation.

Considering the personal investment made by elite athletes, it is not surprising that many complainants fear reprisal from their coaches, parents, sponsors, teammates and sport organizations.<sup>234</sup> Many athletes have concerns that if they come forward with a complaint, they will not be believed, they will be blamed, or they will be resented by their peers.<sup>235</sup> Sport professionals and administrators may fear that by reporting their concerns to an authority they might jeopardize their own careers and those of their colleagues.<sup>236</sup> Parents of athletes and peers of athletes may fear implications for themselves, their children (in the case of parents) and the potential to create repercussions that could negatively impact the whole team or harm the reputation of the sport.<sup>237</sup>

Academics have identified specific factors that may influence the likelihood of reporting a maltreatment incident. Hartill says that lack of reporting usually results from one, or often a combination, of four things: **absence of behavioural ownership and accountability; non-existent, ineffective, or unenforced procedures; flawed internal belief system at institution;** and/or the **organization operating as a total institution.**<sup>238</sup>

Hartill's first factor, **absence of behavioural ownership and accountability** has been demonstrated repeatedly by the sport organizations implicated by high profile Canadian and American cases of sport sexual abuse. Canadian hockey coach Graham James, ski coach Bertrand Charest, and USA gymnastics coach Larry Nassar, were all convicted of repeated sexual exploitation of athletes over many years. It is believed, in each of these

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<sup>234</sup> Stirling, *supra* note 4 at 234.

<sup>235</sup> Brackenridge, *supra* note 3 at 168.

<sup>236</sup> Kerr, *supra* note 4 at 10.

<sup>237</sup> *Ibid.*

<sup>238</sup> Hartill, *supra* note 87 at 225.

cases, that people at various levels within the organizations knew or suspected that some form of maltreatment was taking place.<sup>239</sup> In recent cases at USA Swimming,<sup>240</sup> USA gymnastics,<sup>241</sup> Alpine Canada<sup>242</sup> and Gymnastics Canada,<sup>243</sup> it is widely believed that those in leadership positions at these national sport organizations were silently complicit.<sup>244</sup> A quote attributed to Boston lawyer Mitchell Garabedian, who represented gymnast survivors in the Nassar case, explained the phenomena of collective adult silence saying, “If it takes a village to raise a child, it takes a village to abuse one.”<sup>245</sup>

Organizational silence and lack of accountability is further compounded when policy and procedures are non-existent or unenforced. The second of Hartill’s four factors, **non-existent, ineffective, or unenforced procedures** identifies this issue.

Athlete maltreatment has received attention in varying degrees for over thirty years. Media exposés in the 1990s revealed parental over-investment in sport, brutal coaching methods, athletes training through serious injury and severe nutritional maltreatment of athletes,<sup>246</sup> some of which even resulted in athlete deaths.<sup>247</sup> USA Gymnastics responded to the reports by taking immediate action. They hired a nutritionist and sport psychologist, educated coaches about eating disorders, put safety measures in place that included expelling offending coaches and publishing a banned coaches list. They

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<sup>239</sup> Donnelly, *supra* note 4 at 22.

<sup>240</sup> Amanda Arnold, “Olympic Swimmer Ariana Kukors Claims USA Swimming Covered Up Sexual Abuse”, *New York Magazine* (21 May 2018), online: <<https://www.thecut.com/2018/05/olympic-swimmer-claims-usa-swimming-covered-up-sexual-abuse-ariana-kukors.html>>.

<sup>241</sup> Maggie Astor, “Senators Call for Committee to Investigate U.S.A. Gymnastics”, *The New York Times* (7 Feb 2018), online: <<https://www.nytimes.com/2018/02/07/sports/usa-gymnastics-senate-investigation.html>>.

<sup>242</sup> Mike McLaughlin, “Three Victims of Ex-ski Coach Bertrand Charest Suing Alpine Canada”, *Canadian Press* (12 December 2018).

<sup>243</sup> Nicole Thompson, “Woman Testifies Former Canadian Gymnastics Coach Kissed Her on the Lips When She was 12”, *The Canadian Press* (October 23, 2018).

<sup>244</sup> Donnelly, *supra* note 4 at 22 and 23.

<sup>245</sup> Open Road Films, *Spotlight*, (Los Angeles, Cal: Open Road Films, 2015).

<sup>246</sup> Novkov, *supra* note 200.

<sup>247</sup> *Ibid.*

provided educational seminars for coaches and gymnastics clubs and encouraged criminal background checks before hiring.

Coaches were no longer allowed to travel alone with athletes of the opposite sex and clubs were made aware that coaches should not be alone with athletes in closed spaces.<sup>248</sup> It was said to be the beginning of a new era. The US Gymnastics Federation believed their efforts had empowered athletes and in 1995, a federation representative reported on these new safeguards saying that athletes would no longer be afraid to speak up.<sup>249</sup>

The results were disappointing, however. In fact, they provide a prime example of Hartill's "ineffective and unenforced procedures". Before the Nassar case made headlines in 2016, several high profile coaches in USA Gymnastics and USA Swimming were convicted of sexual abuse of athletes after years of rumours and acquittals throughout the 1980s and 90s.<sup>250</sup> Among the convicted was US Olympic gymnastics coach and sport hall of fame member, Don Peters, the very same USA Gymnastics representative who was originally quoted bragging about those new safeguarding rules for USA Gymnastics back in 1995.<sup>251</sup>

Canada has had a similarly dismal record with ineffective and unenforced procedures. Frequently identified as a world leader in safeguarding of athletes,<sup>252</sup> Canadian athletes saw little improvement in spite of extensive mandatory screening measures<sup>253</sup> and a 1996 policy that required all federally funded sport organizations to create, and publish, a

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

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

<sup>250</sup> *Ibid.*

<sup>251</sup> *Ibid.*

<sup>252</sup> Bradford M Preston, "Sheldon Kennedy and a Canadian Tragedy Revisited: A Comparative Look at U.S. and Canadian Jurisprudence on Youth Sports Organizations' Civil Liability for Child Sexual Exploitation" (2006) 39:4 *Vanderbilt J Transnatl L* 1333.

<sup>253</sup> Note: Peterson hails Canada as a world safeguarding leader. He states that following the 1997 conviction of Graham James, who was once crowned "Hockey Man of the Year", background checks became mandatory for every coach, manager and league official in Canadian minor hockey. See Jamie Peterson, "Don't Trust Me With Your Child': Non-Legal Precautions When the Law Cannot Prevent Sexual Exploitation in Youth Sports" (2004) 5:2 *Texas Rev of Ent & Sports L* 297.

harassment policy as well as appointing both a male and a female independent harassment officer.<sup>254</sup>

Donnelly reports that by 2014, only 38% of national sport organizations had an available harassment policy and not one had a trained, independent investigator.<sup>255</sup> Sport organizations had saved funds by giving responsibility for investigation of complaints to an existing staff member, who was in some cases the CEO of the organization.

Donnelly's study indicated that Canadian sport organizations "lacked the capacity – time, personnel and expertise – to implement the policy requirements and address issues of athlete maltreatment appropriately."<sup>256</sup> Hartill would likely add that they also lacked behavioural ownership and accountability and possessed flawed internal belief systems.

A **flawed internal belief system** is identified as Hartill's third factor contributing to lack of maltreatment reporting. This is primarily a sport culture issue, but the problem is further perpetuated by the insular nature of sport self-regulation. Sport organizations frequently deny the existence of athlete maltreatment, ignore complaints, do not hold offenders accountable, and in some cases, blame or penalize athlete complainants.<sup>257</sup>

These behaviours are able to continue because of the existence of a hierarchical system that gives ultimate power to the sport organization with no independent outside oversight or checks on the system.

This was never more obvious than in the case of Larry Nassar and the US Association of Gymnastics (USAG).<sup>258</sup> Contributing factors to the lack of effective policy enforcement at USAG included self-regulation and internal investigations, the outcomes of which were directly impacted by the organization's belief system. Internal belief systems may

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<sup>254</sup> Donnelly, *supra* note 4 at 33.

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

<sup>256</sup> *Ibid.*; Note: Similarly, the National Society for the Prevention of Cruelty to Children in the UK reported that half of sport governing bodies still did not have child protection policy in 1999. See National Coaching Foundation/National Society for the Prevention of Cruelty to Children (NCF/NSPCC), *Child Protection in Swimming* (London : NCF/NSPCC, 1999).

<sup>257</sup> Mintz, *supra* note 7.

<sup>258</sup> Novkov, *supra* note 200.



be dismissive of safeguarding measures because they believe it will force unwanted regulation and policing on the organization, along with detrimentally changing coach-athlete relationship by making coaches the “moral guardians” of their athletes.<sup>259</sup>

Another defence of sport self-regulation lies in the historical emphasis on the technically distinct and unique nature of various sports, which suggests there cannot be one set of rules that effectively applies to all.<sup>260</sup> Academics Garratt, Piper and Taylor support this position. They resist uniform, nationally imposed, safeguarding measures, suggesting they are reactionary, a result of moral panic, and as such detract from effective coaching practices, while creating fear of accusation, as well as unnecessary confusion and anxiety for coaches.<sup>261</sup>

They claim that safe sport policies are demonizing good coaches for the sake of a few exceptions.<sup>262</sup> They are opposed to removing subjectivity from coaching by creating a “one size fits all” rule book. Further, it is suggested by Garratt et al. that the problem of sexual abuse in sport should be blamed on greater societal problems. Just like authorities did in the Catholic Church, Garratt et al. point to sexualization and immorality in society, claiming that this is not a sport-specific issue.<sup>263</sup>

The Parent and Demers study suggests that attitudes, like those expressed by Garratt et al., contribute to the belief system at sport organizations. Their study showed a lack of recognition of maltreatment issues by sport administrators, a preference for silence and turning a blind eye,<sup>264</sup> and a distorted belief that they were already doing everything

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<sup>259</sup> Garratt, *supra* note 201 at 624

<sup>260</sup> *Ibid* at 617.

<sup>261</sup> *Ibid* at 625.

<sup>262</sup> Garratt, *supra* note 201 at 618; Sipe, *supra* note 221.

<sup>263</sup> *Ibid*.

<sup>264</sup> *Ibid*.

possible to prevent athlete maltreatment.<sup>265</sup> Parent and Demers state that the existence of policy alone is insufficient to overcome a powerful belief system.<sup>266</sup>

The Parent Demers study revealed that even when administrators were aware of the existence of official safeguarding policies, athletes and their families often were not.<sup>267</sup> In most instances, Parent and Demers found that complaints were addressed by sport organizations in a reactive manner, with little emphasis on prevention.<sup>268</sup> In many cases there was no investigation, internal or otherwise, nor any sanctions for offenders following the complaints.<sup>269</sup> Parent and Demers also concluded that national level policy may have little impact on provincial and community level sport.<sup>270</sup>

Hartill's fourth factor, **organizations operating as total institutions** or as "total societies",<sup>271</sup> is spinoff of the closed nature of sport self-regulation. Total institutions often intentionally separate their members from the larger population. Coaches, or team leaders, control most aspects of their members' lives. This control might include where and what they eat, where and when they sleep, where and when they train, and when and with whom they socialize.<sup>272</sup> Total institutions may include the military, fraternities, same-sex private schools,<sup>273</sup> same-sex dormitories, street gangs, and of course, sports teams (particularly university teams, elite teams and professional teams).<sup>274</sup>

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<sup>265</sup> Parent, *supra* note 202 at 125.

<sup>266</sup> *Ibid* at 127.

<sup>267</sup> *Ibid* at 121.

<sup>269</sup> *Ibid*.

<sup>270</sup> *Ibid* at 121.

<sup>271</sup> Fogel, *supra* note 77 at 146.

<sup>272</sup> Merrill Melnick, "Male athletes and Sexual Assault" (1992) 63 J of Phys Ed Rec & Dance 32; Robinson, *supra* note 138 at 57.

<sup>273</sup> Shamus Kahn, *Privilege: The Making of an Adolescent Elite at St. Paul's School* (NJ: Princeton University Press, 2011).

<sup>274</sup> Fogel, *supra* note 77 at 146; Patricia Yancey Martin, "The Rape Prone Culture of Academic Contexts, Fraternities and Athletics" (2015) 30:1 Gender and Society at 36, online: <<https://doi.org/10.1177/0891243215612708>>.

Members of total institutions are sometimes subjected to humiliating or sexualized hazing rituals.<sup>275</sup> They are forced to give up most of their personal time to participate in exercising, training, and socializing designed to break down individuality and resocialize the group as a cohesive and interdependent team.<sup>276</sup> Total institutions are sometimes headed by leaders who build a propensity for maltreatment by and among their members by reinforcing negative stereotypes about marginalized groups through discriminatory or offensive language and behaviour, and by covering up or turning a blind eye to behavioural infractions.<sup>277</sup>

Hartill's four factors provide convincing arguments for external independent regulation as the best way to create effective cultural change and alter belief systems in order to improve incident reporting, investigation and addressing of athlete maltreatment.

### **3.6 The Role of Scholars, Policy and Law**

Government and sport organization responses to addressing athlete maltreatment have proven to be ineffective. Policy was rushed into place in the 1990s to weed out "bad apples", but without addressing broader cultural issues or providing for necessary funding, oversight or accountability.<sup>278</sup> Some academics and policy makers in the 1990s and early 2000s participated in demonizing perpetrators, and often narrowed recommended prevention efforts to screening efforts and the creation and sharing of data

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<sup>275</sup> Robinson, *supra* note 138 at 83; Fogel *supra* note 77 at 146; John Kryk, "Target in 2005 McGill Hazing Horror Speaks Out", *Toronto Sun* (9 November 2013) online: Toronto Sun <<https://torontosun.com/2013/11/09/target-in-2005-mcgill-hazing-horror-speaks-out/wcm/bcad0de0-749b-47fa-9a24-7d6548ab3f4d>>.

<sup>276</sup> Fogel, *supra* note 77 at 146; Lindsay J Fitzclarence, Christopher Hickey & Bruce Nyland, "The Thin Line Between Pleasure and Pain: Implications for Educating Young Males Involved in Sport", in Blye W Frank & Kevin G Davison eds, *Masculinities and Schooling: International Practices and Perspectives* (London On, The Althouse Press 2007) at 131.

<sup>277</sup> Robinson, *supra* note 138 at 54.

<sup>278</sup> Brackenridge, *supra* note 28.

bases in order to keep registered convicted offenders out of sport coaching, as well as devising methods to best avoid incurring liability for sport organizations.<sup>279</sup>

Gibbons' 2003 article called, "Liability of Recreation and Competitive Sport Organizations for Sexual Assaults on Children by Administrators, Coaches and Volunteers", opens with the words "Child molesters are infiltrating...". It proceeds to recommend widespread measures for keeping "monsters" at bay which include: fingerprinting, background checks, a sexual offender registry, an FBI database to track the movements of convicted sexual predators and public notification of the whereabouts of criminals who may present a threat to society.<sup>280</sup>

US Youth Soccer Association created a kidsafe program in the early 2000s, stating their goal was: "...to promote the health, safety and protection of its players".<sup>281</sup> But the safeguarding measures they implemented focused on attempts to: "exclude from participation in its activities all persons who have been convicted of felonies, crimes of violence or crimes against persons,"<sup>282</sup> as well as training coaches, parents and athletes to "spot predatory behaviour".<sup>283</sup>

Similarly, Peterson's 2004, article called "Don't Trust me with Your Child: Non-Legal Precautions When the Law Cannot Prevent Sexual Exploitation in Youth Sports", focuses on background checks and identifying how "coaches-turned-pedophiles slip through

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<sup>279</sup> Anita MJD Moorman & JoAnn M Eickhoff-Shemek, "Risk Management Strategies for Avoiding and Responding to Sexual Assault Complaints" (2007) 11:3 ACSM's Health & Fitness J 35; Michael Gibbons & Dana Campbell, "Liability of Recreation and Competitive Sport Organizations for Sexual Assaults on Children by Administrators, Coaches and Volunteers" (2003) 13:3 J Leg Aspects Sport 185.

<sup>280</sup> Gibbons, *supra* note 279 at 185 and 204.

<sup>281</sup> *Ibid.*

<sup>282</sup> *Ibid* at 209.

<sup>283</sup> *Ibid.*

cracks”.<sup>284</sup> Peterson also recommends safeguarding physical sport facilities and teaching parents and young athletes how to recognize inappropriate behaviour.<sup>285</sup>

Preston’s 2006 article analyzes Canadian initiatives to address sexual exploitation of athletes in the aftermath of the Graham James hockey sexual abuse convictions.<sup>286</sup>

Comparing Canadian and American initiatives, he concludes that the Canadian system is more effective because the Canadian doctrine of vicarious liability only requires proof of a connection between the organization’s work and the employee/perpetrator’s offence, and evidence that the connection foreseeably enhanced the risk of harm,<sup>287</sup> whereas in the USA, vicarious liability requires proof that the employer was actually guilty of deliberate indifference or negligence.<sup>288</sup>

Preston praises the Canadian recommendations, made by Gordon Kirke in the *Players’ First Report*,<sup>289</sup> which recommended screening, a child abuser registry, regular evaluations of coaches, as well as educational training for coaches, and teaching athletes to recognize potentially harmful situations.<sup>290</sup> Besides embracing these generalized, sometimes unproven, and in some cases known to be ineffective, measures for prevention, Preston himself uses the rhetoric of moral panic, when he quotes a police officer as saying sport is “a ready-made cesspool for pedophiles”,<sup>291</sup> and he does so again when he warns that safe sport prevention measures within organizations can create paranoia, witch hunts and the potential for losing volunteers.<sup>292</sup>

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<sup>284</sup> Peterson, *supra* note 253 at 297.

<sup>285</sup> *Ibid.*

<sup>286</sup> Preston, *supra* note 252.

<sup>287</sup> *Ibid* at 1364.

<sup>288</sup> *Ibid* at 1370.

<sup>289</sup> Kirke, *supra* note 23.

<sup>290</sup> Preston, *supra* note 252 at 1349.

<sup>291</sup> *Ibid* at 1395.

<sup>292</sup> *Ibid* at 1367.

South African Pierre Joubert wrote his LLM thesis on accountability in coach-athlete sport relationships, but seemed unfamiliar with current terms for athlete maltreatment offences. He relied heavily on the recommendations of academics like Gibbons and Campbell, and lawyers like Kirke, that screening is the best route to prevention of athlete maltreatment. Like Preston, Joubert points to the existence of Canadian policy as evidence that Canada is a world leader in sport safeguarding.<sup>293</sup>

Many of the academics, relied upon by Joubert, use inflammatory language about pedophilia in sport. Their educational focus is often a non-evidence based approach that involves teaching people how to identify pedophiles, and they frequently rely on screening for registered convicted criminals as their primary source of prevention.<sup>294</sup> In practice, background checks can have a significant associated financial cost and they may not always be completed, even when officially required.<sup>295</sup> Background checks that are completed will only show whether an individual has been convicted of a criminal offence. If the accused was guilty, but was acquitted on a technicality,<sup>296</sup> if the offender was officially pardoned, like Graham James in 2010,<sup>297</sup> or if the offence was plea bargained to a lesser conviction, the sexual offender's true criminal history may not show up.<sup>298</sup>

More recently, legal scholars, Novkov, Brake,<sup>299</sup> and Hampel,<sup>300</sup> have made important contributions to safeguarding in sport. Novkov's 2019 article focused almost exclusively on post-Nassar gymnastics.<sup>301</sup> She favours addressing athlete maltreatment through

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<sup>293</sup> Pierre Joubert, *Accountability Under the Coach-Athlete Relationship in Sport* (LLM Thesis, University of Pretoria Faculty of Law, 2017) [unpublished]; Gibbons, *supra* note 279; Preston, *supra* note 252.

<sup>294</sup> Kirke, *supra* note 23; Preston, *supra* note 252; Gibbons, *supra* note 279; Peterson, *supra* note 253.

<sup>295</sup> Hampel, *supra* note 200.

<sup>296</sup> *Ibid.*

<sup>297</sup> Fogel, *supra* note 197.

<sup>298</sup> Peterson, *supra* 253 at 297.

<sup>299</sup> Brake, *supra* note 200.

<sup>300</sup> Hampel, *supra* note 200.

<sup>301</sup> Novkov, *supra* note 200.

athlete empowerment, suggesting that increasing athlete autonomy, through involvement in decision making, and recognition of their sexuality, could mean that athletes are able to gain the credibility they need to challenge inappropriate behaviours on behalf of themselves and their teammates.<sup>302</sup> She emphasizes the difference between dependence and vulnerability, noting that dependency is an objective label, and that dependent individuals require protection when relationships of care malfunction. This perspective automatically, and sometimes falsely, makes sexual abuse survivors into victims, rather than recognizing their intelligence, autonomy and vulnerability to manipulation.<sup>303</sup>

Novkov indicates that US Safe Sport has put most of its efforts into cracking down on sexual predators, many of whom were also convicted by criminal courts.<sup>304</sup> She says that if we can end the false impression that coaches who maltreat athletes are either notorious pedophiles or justified as tough coaches working toward a serious goal, it might become easier to recognize all forms of athlete maltreatment as potentially harmful, rather than focusing on the most sensational.<sup>305</sup>

Brake suggests that at the university level, romantic relationships between coaches and athletes are common, and in many cases are only considered problematic if there is a sexual assault or form of sexual harassment that is legally actionable.<sup>306</sup> She suggests that while Title IX<sup>307</sup> has created sport opportunity for women athletes, it has not positively impacted sport culture. She believes that the public impression that American women have achieved equality in sport has actually left women athletes without remedy for equality issues that do not fall under the specific protections of the Title IX legislation.<sup>308</sup>

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<sup>302</sup> *Ibid.*

<sup>303</sup> *Ibid.*

<sup>304</sup> *Ibid.*

<sup>305</sup> *Ibid.*

<sup>306</sup> Brake, *supra* note 200.

<sup>307</sup> *Education Amendments Act of 1972*, 20 U.S.C. §§1681 - 1688

<sup>308</sup> (2018). Brake, *supra* note 200 at 395.

Brake suggests that all coach-athlete relationships, regardless of athlete age or age differential, are devoid of any real consent because of the inherent power imbalance.<sup>309</sup> Brake proposes banning all coach-athlete relationships and supports switching the perspective from the negative imposition of a strictly enforced sexual harassment policy to the creation of policy that promotes wholistic coaching ethics and athlete wellbeing.

She states that in the sexual harassment model, harm is exclusively related to sexuality and the associated power dynamic, whereas in the wellbeing model, harm avoidance focuses on healthy relationships and shares those responsibilities with the institution. The result of this change in perspective would be a policy that benefits athletes of all genders, and is inclusive of all forms and degrees of athlete maltreatment, instead of making sexual harassment a specifically female problem. Brake, Tomlinson and Yorganci, and Novkov, all agree that an empowered and engaged athlete is a less vulnerable athlete.<sup>310</sup>

Hampel addresses sexual abuse in Olympic sport by examining USA Gymnastics and the Larry Nassar case. She blames a reactionary tendency in policy creation rather than a proactive prevention model. She indicates that statements of public commitment frequently bring no meaningful change.<sup>311</sup> She suggests that athlete maltreatment offences should be specifically criminalized and that complicit organizations should be held legally accountable. Whereas top-down approaches have failed, she believes that education and mandatory reporting can be effective tools for prevention, but that the first step is cultural change, which requires switching the current sport focus from winning medals to athlete wellbeing.<sup>312</sup> Hampel's recommendations include the same ideological and structural changes that this thesis will recommend in Chapter Six.

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<sup>309</sup> *Ibid* at 396.

<sup>310</sup> *Ibid* at 396.

<sup>311</sup> Hampel, *supra* note 200.

<sup>312</sup> *Ibid*.



### **3.7 Conclusion**

Addressing athlete maltreatment through existing channels can be daunting because of longstanding masculine hegemonic, capitalist and militaristic sport influences. Lack of reporting by athletes, and inability to speak up about maltreatment occurs because of normalization, fear, perceived bias, a discriminatory sport belief system, and because of a pervasive win at all costs mentality.

Athletes have been left out of safe sport conversations until very recently, but research suggests that solutions will be most effective if they come through a combination of athlete empowerment and a holistic focus on athlete wellbeing, enhanced by widespread education and cultural change. It is widely accepted by academics that the emphasis must be on prevention and reporting, and the first step toward this is the creation of external independent sport regulatory body.

Maltreatment strategies will need to break down the hierarchical system that perpetuates gender discrimination and power imbalance. The scope of research and prevention measures must be broadened from a sexual harassment and sexual abuse focus to an athlete maltreatment focus. Inappropriate behaviour by sport authority figures does not have to be sexual or criminal in order to be worthy of redress. Recognizing all forms and degrees of maltreatment will create a healthier athlete environment where the most harmful forms of abuse are less likely to occur. When athletes, coaches and the entire organization are healthy and operating inclusively and cohesively, all those within the system will flourish.

## **CHAPTER FOUR - A QUALITATIVE CASE STUDY OF CANADIAN ATHLETES: METHODS**

In order to get a sense of the athlete perspective on the state of maltreatment in sport in Canada, and the effectiveness of legislation, policies and organizational response to these issues, a qualitative study of athletes and athlete parents was undertaken.

### **4.1 Sample, Representation and Data Collection**

A respondent sample, inclusive of twelve witnesses in the Charest<sup>1</sup> trial, was identified. An arm's-length method of invitation to participate in the study was devised by using the method sometimes referred to as "insider assistance".<sup>2</sup> This means that rather than the researcher directly contacting individuals to invite them to participate in the qualitative case study, one insider was initially contacted who then agreed to put out a general request to other athlete maltreatment survivors inviting them to participate in the study.

Research ethics approval was obtained from Dalhousie University in October 2017 and the research was concluded in September 2019.<sup>3</sup> The respondent sample was originally limited to eight Charest trial witnesses as these were initially the only respondents accessible to the researcher through the arm's-length insider assistance method. As the study progressed however, other athletes, and parents of athletes, contacted the researcher directly or were referred to the project.

After receiving approval for amendments to the respondent sample group in February 2018 and again in November 2018, six additional participants were added to the study, and three additional participants were added at the "member validation" stage. The member validation stage involved sending a summary of findings to study members, in

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<sup>1</sup> *Charest c R*, 2017 QCCA 2048 (CanLII); Note: Bertrand Charest is a former national alpine ski coach who was convicted of sexual exploitation of athletes in 2019.

<sup>2</sup> Nigel King & Christine Horrocks, *Interviews in Qualitative Research* (London: Sage Publications, 2010) at 32.

<sup>3</sup> REB File # 2017-4262, Dalhousie University Research Ethics, Office of Research Services, PO Box 15000, Halifax, NS, B3H 4R2 Canada Phone: 902-494-3423 Email: ethics@dal.ca.

this case interested athletes and athlete parents, who may or may not have been interviewed for the qualitative study. This brought the total number of athletes, and athlete parents, involved in the study to seventeen.

Semi-structured interviews were conducted between April 2018 and December 2018. Before proceeding with interviews it was first necessary to make sure that, considering the sensitivity of the subject matter and the fact that many of the interview participants could be sexual assault survivors, all possible precautions were taken. Meticulous consideration was given to protecting the health and wellbeing of each prospective interviewee. An affiliation with Arive, a branch of Arete Human Resources, was established and toll free numbers were provided to all participants giving them access to free counselling services if any participant experienced distress related to their interview.

Each participant was provided with a list of interview questions, and was asked to sign a consent form,<sup>4</sup> after being explained the voluntary nature of participation and the researcher's personal and contractual commitment to confidentiality. All materials were available in both French and English and the opportunity all efforts were made to conduct interviews in a highly sensitive manner. Respondents were encouraged to only participate in the interviews if they were completely comfortable and to skip any questions they preferred to not address. Participants were told that they could take a break or terminate the interview at any time. Each participant was asked the same list of questions.

Interviews were all conducted entirely and solely by the researcher and they were audio recorded with permission from the interviewees, and then professionally transcribed verbatim. The professional transcriptionist was required to sign a confidentiality agreement. In order to preserve anonymity, names were never used and participants are referred to as Athletes One to Fourteen, and Parents One, Two and Three.

Fourteen subjects participated in the full interview process. Interviews ranged from 70

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<sup>4</sup> Appendix C: Interview questions in French and English, arm's-length participation request letter and participant consent form.

minutes to 120 minutes in length. Eight interviews were conducted using FaceTime and six interviews were performed in person. The athletes ranged in age from 17 (this interview was conducted with the athlete's parent) to 37 years, at the time of the interviews. All athletes are currently participating, or did formerly participate, in elite level sports. Six Olympic sports are represented by the sample; five individual sports and one team sport. The participants currently have official residence in five different Canadian provinces and one is living in the United States. Thirteen of the athletes competed, or were the parents of athletes who competed, at the international sport level. Four athletes competed, or were the parents of athletes who competed, at the national sport level. Three individuals represented Canada in the Olympics. Three athletes are currently competing at the American National Collegiate Athletic Association (NCAA) Division One sport level.

## **4.2 Data Analysis**

Data analysis followed three stages.<sup>5</sup> Prior to analysis, recorded interviews were transcribed verbatim by a professional transcriptionist. Typed transcripts were each read several times to identify key points and emerging themes.<sup>6</sup> Descriptive codes were created to directly reflect the transcript notations without adding personal interpretation.<sup>7</sup> Descriptive codes that were similar in content were eventually combined under one heading. This process was repeated for each transcript.

In the second stage of analysis the descriptive codes were grouped together in thematic clusters relevant to the study and given appropriate headings.<sup>8</sup> In order to avoid introducing researcher bias, theoretical concepts were not yet applied. The interpretive codes were then applied to the full data set to create a large table of thematically grouped data.

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<sup>5</sup> King, *supra* note 2 at 152-158.

<sup>6</sup> *Ibid* at 152.

<sup>7</sup> *Ibid* at 153.

<sup>8</sup> *Ibid* at 154.

In the third stage, material was re-examined for repetitive themes and unique outliers and theoretical concepts were applied.<sup>9</sup> Diagrams were created, one from athlete feedback on personal impacts and experiences of harm,<sup>10</sup> and the other representing the general and specific sport maltreatment themes identified through the data analysis and use of interpretive codes.<sup>11</sup> These diagrams were sent to athlete respondents for approval and comment.<sup>12</sup> Quotations were checked for accuracy with relevant athletes and parents, and consent was received to include these quotations in the final report.

Member validation<sup>13</sup> was carried out by submitting a summary of the assembled data to participants in the form of easily understood diagrams. In addition to the original respondent group of fourteen, a small member validation beyond the original group was added to test the validity of results and the applicability of the data to other sports. This new group included a current male national team member, a female provincial level athlete, and the parent of a female provincial level athlete. Unsuccessful efforts were made to include a Paralympic athlete at this stage.

FaceTime interviews were used to discuss the data summary and conclusions with the member validation athletes. Some athletes chose to email their questions or confirmation of data. Besides confirming validity and consistency of the emergent data themes, these late additions also added the perspectives of three new sports, a male athlete perspective, a team sport perspective, another parent perspective, and representation from one more Canadian province.

### **4.3 Protection of Personally Identifiable Information**

Every effort was made to protect the personally identifiable information of the athlete respondents. Audio recorded interviews were immediately deleted once they were

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<sup>9</sup> *Ibid* at 156.

<sup>10</sup> Appendix A: Data Chart on Athlete Impacts from Sport-Related Maltreatment.

<sup>11</sup> Appendix B: Comprehensive Data Chart on Sport Culture.

<sup>12</sup> King, *supra* note 2 at 163.

<sup>13</sup> *Ibid*.

transcribed. Original transcriptions were deleted by the transcriptionist after they were electronically delivered to the researcher. The researcher maintained one full printed copy of each transcribed interview, and these were kept in a locked filing cabinet, along with the respondents' signed contracts of participation, and any personal hand written notes from the interviews. The filing cabinet is accessible only by the researcher and is in the researcher's locked office in the Dalhousie University Law Library.

There were no master lists, no contact lists and no lists with explanatory codes regarding personal identification. None of the formal thesis, thesis summaries, or computer maintained thesis data, contains any protected personally identifiable information. All computer files are encrypted and the researcher's computer is password protected and not accessible to anyone but the researcher. The hard copies of transcribed interviews and the signed respondent contracts will be maintained by the researcher in a locked filing cabinet and will be destroyed three years after submission of the final thesis in August 2020.

#### **4.4 Study Limitations**

This study is somewhat limited by the natural subjectivity of qualitative interviews. The study would have benefited from representation from a wider range of sports.<sup>14</sup> Although the athlete respondents are affiliated with only six different sports, those particular sports include both the winter and summer seasons and they are representative of sports that are considered traditional male and female sports. Many female respondents were competitors in traditional male sports. The athlete respondents all competed at an elite level so the data does not necessarily reflect the experiences of athletes at the recreational or local club level.

A more ethnically and ably diverse interview group and a more gender inclusive group

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<sup>14</sup> Note: In particular it would have been helpful to have more representation from team sports, since individual sports were more heavily represented in this study. It could also have been beneficial to have more representation from judged and finesse sports, since most athlete respondents came from power and performance sports.

would have enriched the comprehensiveness of the data set but because of the research commitment to an arm's-length invitation method it was not possible to fill these gaps. This was also true for geographic representation. The athlete respondents did include both French and English-speaking individuals, representing both coasts as well as several central Canadian provinces and one American state. In spite of the researcher's efforts, there were no representatives any of the three territories, and five provinces were unrepresented.

While six of the athletes, and the three athlete parents, represent the views of current or very recently retired athletes, eight of the athletes were recalling experiences from fifteen to twenty years ago. Reflection, maturation and education on athlete maltreatment issues, combined with the erasure of career risks, is likely to have impacted the retired athletes' perspectives and willingness to share sensitive information. This benefit is balanced by the potential for recollections to have faded over time.

In spite of age differences, sport differences, variances between national and provincial team sports, winter and summer sports, current and retired athletes, the data was remarkably consistent. It should be noted that the interpretation of data, discussion and findings were all prepared by one researcher. Although objectivity was the researcher's goal at all times, a researcher with alternative social or personal perspectives could possibly have drawn some slightly different conclusions.

#### **4.5 Reliability or Trustworthiness**

In attempting to determine the reliability of the study the researcher relied upon the works of Lincoln, and of Braun.<sup>15</sup> Braun states that quantitative research reliability and transferability of data require minimal involvement of the researcher so as to minimize bias and facilitate the extraction of objective, generally applicable theories.<sup>16</sup> Qualitative studies require that the researcher intentionally engage with study participants. Unique

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<sup>15</sup> Yvonna S Lincoln & Egon G Guba, *Naturalistic Inquiry* (Beverly Hills: Sage, 1985); Victoria Braun & Victoria Clarke, *Successful Qualitative Research* (London: Sage, 2013).

<sup>16</sup> Braun, *supra* note 15 at 279.

individual perspectives and context are relevant and important to the qualitative researcher.<sup>17</sup>

Given the inherent bias in qualitative research, Braun and Lincoln both suggest using the term trustworthiness rather than reliability.<sup>18</sup> Lincoln proposes that qualitative research credibility, or trustworthiness, should be determined based on whether research conclusions are consistent with the views of the research subjects.<sup>19</sup> By providing respondents with a summary of interpreted data and receiving their feedback, the researcher was able to confirm support for research conclusions.

Support for research conclusions was further confirmed at the member validation stage. Lincoln indicates that there must be transferability of conclusions in order to have reliability.<sup>20</sup> In this case, conclusions received from individual research subjects were deemed acceptable by the other research subjects. This suggests that the data has some transferability, allowing it to be cautiously applied, or at least considered, with respect to other sports and sport settings.

Qualitative research is usually associated with somewhat unstable research settings because all interview conditions cannot be absolutely controlled.<sup>21</sup> This inconsistency indicates a potential source for irregularity in the data. Although some interviews were conducted in person and others were conducted by FaceTime, all interviews used the same questions, in the same order, and followed the same style and course, so that as much consistency was preserved as possible. Finally, although qualitative research cannot be totally objective, “confirmability” exists when sufficient detail is provided by the researcher so that it can be used to justify conclusions.<sup>22</sup> In this thesis, interview detail

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

<sup>18</sup> *Ibid*; Lincoln *supra*, note 15 at 290.

<sup>19</sup> Braun, *supra* note 15 at 282; Lincoln, *supra* note 15 at 314.

<sup>20</sup> Lincoln, *supra* note 15 at 314.

<sup>21</sup> Braun, *supra* note 15 at 279.

<sup>22</sup> Lincoln *supra* note 15 at 219 and 323.



was included to the greatest extent possible in order to thoroughly provide support for research conclusions.

## CHAPTER - FIVE QUALITATIVE STUDY RESULTS

### 5.1 Introduction - Sport Culture and Athlete Impacts From Maltreatment

This chapter will closely examine the data drawn from the qualitative study introduced in Chapter Four. One clear, overarching theme emerged from the respondent interviews and this theme seemed to underpin and influence, every subheading that followed. That dominant theme is **Sport Culture**. A second, more subtle emergent theme is, **Athlete Impacts From Sport-Related Maltreatment**.

It is essential to begin by examining the impacts of athlete maltreatment because they provide the true inspiration and motivation for this thesis. Understanding the extent of the short and long term harm and suffering caused by athlete maltreatment establishes that athlete maltreatment is a significant, widespread, and mostly unrecognized, public health crisis in need of immediate attention. It is also essential to closely examine these impacts because they are frequently misunderstood or misrepresented, sometimes even by those who experience them. Based on the athlete respondent data on maltreatment I created a list of **social, personal, physical, psychological, financial and professional impacts** which are attached as Appendix A under the heading, “Data Chart on Athlete Impacts From Sport-Related Maltreatment”.<sup>1</sup> These will form the subheadings for the discussion on athlete impacts in this chapter.

The other umbrella theme, Sport Culture, provides the heading for the second chart attached in the thesis appendix. The “Comprehensive Data Chart on Sport Culture”<sup>2</sup> was compiled using the extensive data collected from the interviews with athletes and athlete parents. Sport Culture was placed at the top of this chart as athlete respondents repeatedly identified sport culture as the root cause of maltreatment in sport. Sport culture emerged as the primary influence, connected to, and directly impacting, everything beneath it.

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<sup>1</sup> See Appendix A: Data Chart on Athlete Impacts from Sport-Related Maltreatment.

<sup>2</sup> See Appendix B: Comprehensive Data Chart on Sport Culture.

Four key sub-concepts figure in the blocks just below the Sport Culture heading. These sub-headings represent the other major causes of abuse in sport as emerging from the data. They are: Historic Male Dominance in Sport, Insufficient Education on Maltreatment Issues in Sport, Sport Self-Regulation and Distorted Priorities in Sport. In the data chart, these four thematic categories branch into boxes representing the causes, attitudes, behaviours, outcomes and impacts associated with each concept or issue identified by the sub-headings.

The two data charts provide a general overview and a visual summary and analysis of the information collected in the qualitative study. Chapter Five will examine in detail the issues raised by these data charts. The chapter is organized using the two major headings, Athlete Impacts From Sport-Related Maltreatment and Sport Culture, followed by their sub-headings.

Theories will be supported with academic literature and athlete quotations, so that as much as possible, a direct voice can be given to the athletes themselves. This is particularly important because athlete insights are valuable, but also because many athlete respondents feel that they have never truly been heard on this issue, and most continue to feel discouraged about current and future strategies for prevention and redress of athlete maltreatment.

## **5.2 Athlete Impacts**

For many athlete respondents, maltreatment repercussions were extensive and long lasting. They included: suicide attempts, post traumatic stress disorders, eating disorders, physical injuries, drug and alcohol abuse, ongoing sexual, relationship and trust issues, financial hardship and the devastating destruction of long-pursued athletic dreams.

### 5.2.1 Social and Personal Harm

Sometimes, as explained by former National Hockey League player, Sheldon Kennedy, athlete complainants are not believed<sup>3</sup> and the harm they experience may be downplayed.<sup>4</sup> If a close relationship exists between coach and athlete, it may even be suggested that a sexual relationship between them might have been consensual.<sup>5</sup> One athlete described how hurtful it was when her athlete peers acted as if she had been complicit in her own sexual assault.

And then a lot of my peers at the [sport club] not only thought it's just as much my fault as [the coach's]... They even said 'It's too bad the [sport club] doesn't have video cameras as we could have caught them hooking up'. - Athlete Eleven

Another athlete respondent said the president of her national sport organization was dismissive about the criminal conviction of a Canadian national team athletic coach for sexual exploitation.

She has been kind of ruthless about the whole [name of coach] thing saying things to my sponsors or whatever that it is not even a big deal and that it is a lot worse in other sports. - Athlete Nine

If athletes believe that the harm to them will not be recognized and their complaints will be downplayed in this manner, they are not likely to risk coming forward, and this is equally true, not just for sexual abuse, but for all types of athlete maltreatment. The situation may be further complicated by outward appearances of athlete confidence and athletic success. When athlete maltreatment survivors appear to be in control and

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<sup>3</sup> Sheldon Kennedy with James Grainger, *Why I Didn't Say Anything* (London, Ontario: Insomniac, 2011) at 131, 133 and 144.

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

<sup>5</sup> Kennedy, *supra* note 3 at 144; Sandra Kirby, Lorraine Greaves & Olena Hankivsky, *The Dome of Silence: Sexual Harassment and Abuse in Sport* (Halifax: Fernwood, 2000) at 78.

continue to achieve results in their sports, it sometimes encourages outsiders to assume that not only can they handle the maltreatment, but also that perhaps no harm was actually done.<sup>6</sup>

One athlete respondent expressed her frustration, with the lack of support or assistance from adults who became aware of the ongoing sexual abuse in her sport:

Some coaches in Europe were like, ‘Oh well, that is not a big deal’... A guy [at the local Canadian sport venue] was saying, ‘Oh, you know, these girls were old [seventeen and eighteen]. They knew what they were doing. They were just having fun’....  
Some people think it is not a big deal. - Athlete Six

A study by Fasting and Walseth suggests that continued high level athletic performances do not indicate an absence of harm to the athlete.<sup>7</sup> One athlete respondent explained how she was able to use compartmentalization to temporarily ignore her sexual abuse and focus on athletic goals.

"I just shut it down and I remember thinking the only way to actually punish this guy is, I'm just going to prove to him that I can make it in [my sport] without him.... I still [competed] well. You didn't see a dip in my results. You didn't see me break down in tears every day on the road.... They [teammates who were upset] got even more mad because I was fine." - Athlete Seven

The McGovern study indicates that, in consensual sexual situations, elite female athletes are often more assertive than non-athlete peers, and they also assume risk more frequently.<sup>8</sup> Elite female athletes may act more confidently than non-athletes when facing

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<sup>6</sup> Kari Fasting & Kristin Walseth, "Consequences of Sexual Harassment in Sport for Female Athletes" (2002) 8:2 J Sexual Aggression 37 at 40.

<sup>7</sup> *Ibid.*

<sup>8</sup> Jen McGovern, "Strong Women Never Mumble: Female Athlete Attitudes About Sexual Consent" (2017) J Interpers Violence at 20, published online: <<https://doi.org/10.1177/0886260517730022>>.

sexual violence, but they may be more impaired in reporting such crimes because of a perception that being the victim of sexual abuse indicates personal weakness and lack of confidence, characteristics that are discouraged in most elite sport environments.<sup>9</sup>

When athletes show resilience in the aftermath of sexual harassment or assault,<sup>10</sup> this is sometimes explained via the concept of “cognitive readjustment”.<sup>11</sup> These are adaptation skills which are normally associated with a high level of personal confidence.<sup>12</sup> Many of the study participants gave the outward appearance of coping well with their maltreatment and sexual abuse and some of them achieved significant athletic goals in spite of their maltreatment experiences. One athlete respondent wondered if there might have been more support available to the athlete sexual abuse survivors on her sports team if they had not been such confident, high-achievers.

Yeah, like we were confident kids. Yeah, it is like our resilience actually hurt us. If we were less confident we would have looked for help or something.- Athlete One

For many athlete respondents, the most painful wounds did not come from the words of their coaches, but resulted from not being believed and the hurtful things that were said to them by friends, family and community.

Dad never believed how bad it was. He thought I should have known better . - Athlete Seven

I had one board member that called me after it happened and basically verbally harassed me and told me I was a horrible person and that I was the worst thing that ever happened to [the

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<sup>9</sup> *Ibid* at 24.

<sup>10</sup> Fasting, *supra* note 6 at 46.

<sup>11</sup> Sandra Shullman, “Sexual Harassment: Therapeutic Issues and Interventions” (Paper delivered at Conference for Association for Women in Psychology, Newport RI, 1989).

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

sport organization] and who do I think I am?... I had people calling me and saying ‘Get the F— out of here!’ That was hard. - Athlete Eleven

The impact of harm extends well beyond the athletes themselves and may be felt by parents, siblings, friends and communities of those who were injured.

I had them go through the process of writing an apology letter and not just for me. I got one from [sport organization] because of the way they horribly handled my complaint, and I got one from the coach. I also got them to each write one to my mother because [crying] because I know I was twenty, but she had to go through a lot of it and it was more important to me that they apologized to her. And I think that is one of the reasons I wanted the apology for her, just to like recognize that not only did they fail me, but they failed her. - Athlete Eleven

### **5.2.2 Physical Harm**

Sometimes athletes clearly need protection from physically violent coaches, like in the widely-publicized case of Shim Suk-hee, the South Korean speed skating gold medalist who was allegedly beaten by her coach.<sup>13</sup> Most physical harm described by athlete respondents was of a more subtle nature however. Almost all of the athletes expressed concerns about the increasingly sexualized nature of sport. They mentioned the impact of coaches and teammates joking and constantly commenting on girls’ and women’s bodies

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<sup>13</sup> Associated Press, “South Korean Olympic Gold Medallist Shim Suk-hee Allegedly Beaten by Coach”, *CBC Sports* (18 Jan 2018), online: <<https://www.cbc.ca/sports/olympics/winter/speedskating/michael-crowe-speed-skating-canada-investigation-1.4494450>>. Note: This story made international headlines when the world champion speed skater had to temporarily leave a national training centre because she had been physically abused by her coach. An investigation revealed a deep-rooted culture of sexual, physical and psychological abuse. Physical abuse reportedly occurs the least often in sport, but may be the least easily hidden.

and the frequent pushing for weight loss, often accompanied by a serious misunderstanding of the nature of eating disorders.

She was having an eating disorder problem and she was fainting at practices and things like that.... We all thought he should send her home.... Instead he just like kinda told her to push through it. So I don't know, I feel, like that was another example of, you know, this girl was going through a very horrible time in her life and clearly had a lot of body image issues and you are just telling her to push through it? - Athlete Eleven.

One of the athletes in my year... had anorexia. She had been treated for it. Both of her parents were Olympians. Her older sister apparently had anorexia but she did [different sport] and the provincial coach who was at that Canada Games took me aside and asked if I could sit with her while she ate and report to him what she ate. That was how they were managing that, and they weighed her every day, which was a little awkward because we were all in the room, and I don't know why they let her race.... She ended up going to the hospital after those Canada Games. - Athlete Twelve

Controlling and manipulative coaching behaviours relating to food were common place for athlete respondents. Female athletes competing in sports that promote lean body types (like endurance sports, and judged sports that put a high value on appearance), or sports that have weight classes, are recognized as having a significantly greater risk for disordered eating.<sup>14</sup> Many athlete respondents admitted that they had struggled with eating disorders and in contrast to the research, these were often athletes who competed

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<sup>14</sup> Anthony Papathomas & David Lavallee, "Athlete Experiences of Disordered Eating in Sport" (2010) 2:3 *Qualitative Research Sport & Exercise* 354 at 355; Joan Ryan, *Little Girls in Pretty Boxes: The Making and Breaking of Elite Gymnasts and Figure Skaters* (New York: Warner Books, 1996) at 150.



in speed and power sports, which are not usually associated with eating disorders or a desire for thinness (unless they have weight classes, as in rowing and wrestling).

Physical harms described by athlete respondents were sometimes physical manifestations of psychological maltreatment, or the result of competing while injured or exhausted, or from food deprivation. Recognized side effects from malnourishment may include osteoporosis, missed menstrual periods (amenorrhea), and bone fractures.<sup>15</sup> Overuse injuries, athletic burnout, damage to muscles, ligaments and bones, arthritis, as well as anxiety may all result from training while exhausted, injured or unwell.<sup>16</sup> Psychological maltreatment, sexual abuse and neglect, in addition to creating mental health struggles, may also manifest physically, such as through back pain.<sup>17</sup>

I remember as well, back problems, knee problems, headaches, migraines. Never regular in my period. These are all the physical consequences .... We were punished constantly and if it wasn't [competing], or [competing] hurt, or [competing] through pain, he would talk about our physique and he would look at what we were eating and he was saying things like, 'jump in front of the mirror and nothing should shake'. So I became really self conscious with my overall appearance as a teenager. - Athlete Three

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<sup>15</sup> *Ibid.*

<sup>16</sup> Ryan, *supra* note 14 at 27; Anne Stafford, Kate Alexander & Deborah Fry, "Playing Through Pain: Children and Young People's Experiences of Physical Aggression and Violence in Sport" (2013) 22:4 Child Abuse Rev 287; Gregory S Kolt & Robert J Kirkby, "Injury, Anxiety, and Mood in Competitive Gymnasts" (1994) 78:3 Perceptual and Motor Skills 955, online: <<https://doi.org/10.1177/003151259407800351>>.

<sup>17</sup> CV Crooks & DA Wolfe, "Child Abuse and Neglect"; in Mash, Eric J & Russell A Barkley, *Assessment of Childhood Disorders* (NY: Guilford Press, 2007) 1 at 3; Kerr, Gretchen & Ashley Stirling, "Child Protection in Sport: Implications of an Athlete-Centred Philosophy" (2008) 60:2 Quest 307, online: <<https://doi.org/10.1080/00336297.2008.10483583>>.

### 5.2.3 Psychological Harm

Psychological maltreatment may create invisible, but lasting damage. Athletes sometimes felt that psychological maltreatment was particularly harmful because it so often went unrecognized.

I would have rather had the physical [sexual abuse] because the mental never goes away. It is a daily thing and it comes up in my life in some way every day. - Athlete Two

Girls were crying all the time. Because it wasn't just the sexual abuse with a few girls, but it was more psychological abuse with all the other girls so everyone kind of got a taste of his medicine... It was comments about being fat or slow or eating dessert. - Athlete Five

Many of the respondents said that their experiences have stayed with them and that they are frequently confronted by reminders of the maltreatment and/or sexual abuse they endured. Some had difficulty recognizing or admitting that they needed to seek professional help, and many had difficulty sticking with their psychological therapy because it made them feel like they were weak or a failure. Several athlete respondents required medication to address their mental suffering.

He basically broke me in every way possible. I mean he was like physically abusive... I broke my foot and he made me [train]. He would not take me to a doctor. It was torture. But it was like I am not tough enough and that was the stance. You are mentally not tough enough and you are physically not tough enough. - Athlete Two

You read an article or you will hear a story on the radio. It is upsetting, triggering.... It is always there and it will always be. So if we are talking about impact, a long time.... It's not my fault I

needed therapy. So it is like the injustice of it. It makes me so mad. - Athlete Eleven

I was medicated for anxiety and depression for quite a few years after.... I was addicted to them for a long time.... I have had to go back on them so I definitely know I have work to do. - Athlete Seven

All athlete respondents described persistent ongoing challenges in their pursuit of recovery.

I was done. I tried to come back. I could never get over it. And my mental state, by that point, I was mentally injured to the point where I could not come back. I could not do it.... I have been angry about it for so long, for 20 years. And he ruined my life for a chunk of time and he ruined my dream of [particular international competition] which is something I will never get back and never forgive him for. - Athlete Two

There is not a day that goes by that I don't think about it.... I feel like I spent twenty-five years trying to bury this thing and forget about, and just try to cope every day, but I have lost a lot of confidence in myself.... There were times when I thought about suicide, the deep times.... I lost the passion [for my sport], you know?... The abuse started and at that moment my career was over. - Athlete Six

Some of the athlete respondents struggled with suicidal thoughts and many experienced debilitating depression. When an elite athlete suddenly quits their sport without explanation, they may bear an additional social burden because they are treated as if they failed to achieve their athletic goals. These athletes often say they feel publicly judged; there can be an impression that they simply buckled under the pressure of elite competition.

Like mental, I had a mental breakdown for the most part. I was just in a really bad place. I was super depressed.... I was so unhappy and just struggling.... Like this pain is so intolerable and **it is not recognized** and I just don't know what to do.... I was bulimic.... I tried drugs for a while. I dabbled in that.... I was so self-destructive. - Athlete Two (emphasis added).

I did not trust anyone, I felt extremely depressed, suicidal, alone, had to go on medication. I had anorexia.... I wanted to not feel anymore. Short term, I just started to hate myself. It took me years and years and I am still working on it.- Athlete Seven

Psychological maltreatment is the most common form of athlete maltreatment.<sup>18</sup>

Unfortunately psychological maltreatment is so prevalent at the elite sport level that it becomes normalized,<sup>19</sup> and this can make intervention more challenging.<sup>20</sup> Many athletes respondents recalled wanting to quit their sport on several occasions.

He takes credit whenever anyone does well but he takes no responsibility if you have a terrible day.... I just took the yelling as a normal coach because it seemed like all the girls' teams I talked to, their coaches were the same. Everyone was really harsh on them. Everyone yelled at them all the time so I didn't really see that as a problem until it started affecting my approach to [competing] and my personality when I was [competing]. At the end, I hated it and I didn't want to [compete] anymore and I

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<sup>18</sup> Gretchen Kerr, Erin Wilson & Ashley Stirling, "Prevalence of Maltreatment Among Current and Former National Team Athletes" (30 April 2019) at 12, online: [athletescan.com](https://athletescan.com) <[https://athletescan.com/sites/default/files/images/prevalence\\_of\\_maltreatment\\_reporteng.pdf](https://athletescan.com/sites/default/files/images/prevalence_of_maltreatment_reporteng.pdf)>.

<sup>19</sup> Gretchen Kerr & Ashley Stirling, "Where is Safeguarding in Sport Psychology Research and Practice?" (2018) 0 J Applied Sport Psychology at 5, online: <<https://doi.org/10.1080/10413200.2018.1559255>>.

<sup>20</sup> *Ibid* at 4 and 5.

didn't want to... like the days weren't really worth it. - Athlete  
Eight

#### **5.2.4 Financial Harm**

In addition to psychological, personal, social and physical harms, athletes sometimes experience significant financial hardships if sponsorships are abandoned due to a drop in performance results or if maltreatment or injury leads to early retirement. One athlete respondent said their career ended prematurely after they experienced personal emotional and financial hardship related to their sport. All of this was received with an extreme lack of compassion by their national sport organization.

When I had to miss a training camp due to personal financial hardship from sport and emotional stress from my parents divorce... they gave me a severe warning and let me know the next miss would mean loss of funding.... The experience made me retire years before I was projected to reach my potential. -  
Athlete Fourteen

Everything was so unhealthy.... And then long term, financial stress, again for results... [Inconsistent results affected sponsorship]. - Athlete Three

#### **5.2.5 Professional Harm**

Siegel questions how many children would choose to give up a normal childhood for the elite athlete's life of hard and often tedious work, social sacrifice, loss of educational opportunity and in some cases severely restricted diets, exposure to physical danger and regular psychological abuse.<sup>21</sup> Many of the athlete respondents reflected that if they had

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<sup>21</sup> Erica Siegal, "When Parental Interference Goes too Far: The Need for Adequate Protection of Child Entertainers and Athletes" (2000) 18 Cardozo Arts & Ent LJ 427 at 458.

known what they would endure as athletes, they would not have chosen that path. Others suggested that they will want something different for their own children.

There was a lot of bad that came with the good and the environment of being an elite athlete is very highly charged.... When I think about my children now and putting them through a sports system or having them have that life.... I think, do I really want that for my kids? - Athlete Seven

Athlete maltreatment frequently leads to early retirement.<sup>22</sup> Many athletes in the Kerr study report that their athletic injuries continue to impact their quality of life (35% current, 53% retired), that injuries lost them funding and support (28% current and 40% retired) and 33% of retired athletes say their injuries caused their retirement.<sup>23</sup> Athlete respondents suggested that the unrecorded statistics on elite athletes who leave sport because of maltreatment would be staggering.

Look at all the people quitting or look at the numbers dropping [because of maltreatment].... - Athlete Nine

One athlete abandoned a national team position; several left junior national teams; three athletes left Canada to train in other countries; one teenager left home and was billeted with a family in another city; another athlete travelled considerable distances in her community so that she could participate at another club where she felt safe.

Some athletes compartmentalize the impacts of their suffering in order to focus on athletic goals, as evidenced by the Olympic gold medal performances by many of the gymnasts sexually abused by Larry Nassar.<sup>24</sup> These gymnasts made it clear that their

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<sup>22</sup> Kerr, *supra* note 18 at 41.

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

<sup>24</sup> Kerry Howey, "Everyone Believed Larry Nassar: The Predatory Trainer May Have Just Taken Down USA Gymnastics. How Did He Deceive so Many for so Long?", *New York Magazine* (19 November 2018).

athletic success in no way diminished, or somehow made acceptable, the longterm harm from the abuse they endured.<sup>25</sup> As former team USA gymnast, McKayla Maroney articulated, “He abused my trust, he abused my body and he left scars on my psyche that may never go away.”<sup>26</sup>

### 5.3 Sport Culture

Having looked at the impacts of athlete maltreatment in the previous section of this chapter, this section will use respondent data to determine the root causes of that maltreatment. As illustrated in the Comprehensive Data Chart on Sport Culture,<sup>27</sup> the overarching concept emerging from the collected data is that maltreatment in sport is never simply an individual problem caused by one bad coach or sport administrator. Maltreatment inevitably results from unchecked, deep-rooted, cultural problems, sometimes referred to as a “poisoned environment”.<sup>28</sup> Canadian courts have defined a “poisoned environment” in the workplace as, “circumstances where the work environment has become toxic because of pervasive discrimination or harassment, most commonly involving grounds relating to race or sex.”<sup>29</sup> A similar kind of harassment and discrimination is sometimes experienced by athletes in sport.

Many respondents described a poisoned culture in their sport, providing examples of male hegemony and discrimination in their sport organizations, both at the institutional level and throughout their lived sport experiences. Some respondents explained how sexism and systemic discrimination had affected them on a personal and practical level.

[Particular sport] has mostly male coaches and then we have equipment, and the equipment suppliers are mostly men, so you

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<sup>25</sup> *Ibid.*

<sup>26</sup> Margo Mountjoy, “‘Only by Speaking Out Can We Create Lasting Change’: What Can We Learn From the Dr Larry Nassar Tragedy?” (2019) 53:1 *Brit J Sports Med* 57 at 57.

<sup>27</sup> See Appendix B.

<sup>28</sup> Celia Brackenridge, *Spoilsports: Understanding and Preventing Sexual Exploitation in Sport* (London: Routledge, 2001) at 31; Fasting, *supra* note 6 at 46; Kirby *supra* note 5, at 79.

<sup>29</sup> *Crete v Aqua-Drain Sewer Services Inc*, 2017 HRTO 354.

look in a hotel where there is going to be a [women's sports competition] and you see teenage girls and a bunch of adult men.... Change is not coming from Sport Canada.... It's a systemic problem. - Athlete One

I had a coach who first of all is incredibly sexist. He didn't think women were capable of anything. Like our first camp we had a coach, one of our women coaches, she joined our team last year and he was making jokes about whether she knew how to take a video of us and we were like, 'Yeah, well she has been a coach for five years. Obviously she knows how to take a video.' - Athlete Eight

In this section, the subject headings: Historic Male Dominance in Sport, Insufficient Education on Maltreatment Issues in Sport, Sport Self-Regulation and Distorted Priorities in Sport will introduce discussion about the causes of systemic cultural discrimination in sport.

### **5.3.1 Historic Male Dominance and Inequality in Sport**

Women have been competing in traditional male sports in increasing numbers for the last forty or so years. The expected result of this surge in female athletic involvement might have been a healthy "feminization" of sport; less violence perhaps, or rising levels of compassion or empathy. Rather than reconstructing sport however, it appears that women athletes have, for the most part, wholly bought into traditional male sport values, embracing toughness, denial of pain, and competition, every bit as fiercely as male athletes.<sup>30</sup>

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<sup>30</sup> Martin Roderick, "The Sociology of Pain and Injury in Sport: Main Perspectives and Problems", in Sigmund Loland, Berit Skirstad, & Ivan Waddington, eds, *Pain and Injury in Sport: Social and Ethical Analysis* (London: Routledge, 2006) at 23.



Women may not receive equal treatment when it comes to treatment of injuries however, because their complaints are more likely to be disbelieved due to an assumption that women are more likely to express emotion and complain about being hurt, whereas a man who complains must be seriously hurt. There is also sometimes a perception that men play harder and faster, and are exposed to more sport violence, and therefore their injuries will be more serious.<sup>31</sup>

Respondents complained of discrimination, harassment, a sexualized environment and forms of maltreatment coming under all four maltreatment categories, including psychological abuse, physical abuse, sexual abuse and neglect. Many of the athletes believed these behaviours were modelled by their male and female sport leaders and that the long-standing male-dominant belief systems in their sport organizations continue to perpetuate discriminatory behaviour and ideologies.

Changing the person at the top isn't always the answer. What we need is cultural change.... Women were not helping other women in my sport. It is the belief system, not the gender of the leaders that is important. - Athlete One

[It] is just completely normalized. And like I said I don't know where it comes from, like the systemic thing, if it is because all of these coaches did the exact same things when they were younger, when they were at their training camps or whatever, or just because the atmosphere itself is technically informal.... So it was normal because everybody engaged in that activity whether it was drinking on the weekends, or just not wearing a lot of clothes when you are training. - Athlete Twelve

Athletes suggested that the institutional male dominated power structure and pervasive discriminatory culture made it almost impossible to complain about their maltreatment.

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<sup>31</sup> *Ibid.*

Poisoned sport environments were never addressed at an institutional level because the tendency was to look at maltreatment cases as individual occurrences rather than as organizational problems.

Men control access to everything, coaching, [equipment], spots in [competitions].... It was the team culture so no one saw the problem.... Protections are no use if people [in the institution] don't believe [athlete maltreatment] is actually wrong.... One bad apple, he's in jail, problem solved. - Athlete One

Systemic inequality is often perpetuated by institutional belief systems that make discriminatory behaviour seem normal and acceptable.<sup>32</sup> Respondents reported widespread use of crude or derogatory language and the telling of sexist and homophobic “jokes” by peers, coaches and others in positions of power. These behaviours were also reported by athlete respondents in the Kirby study.<sup>33</sup>

Athlete respondents described being subjected to put-downs, bullying and sexualized taunting or name calling by coaches and male peers and sometimes by members of the sport community or the public. This was also reported in the Kirby study.<sup>34</sup> The use of sexualized language is another way that coaches and athlete peers may assert dominance and encroach on personal boundaries.<sup>35</sup> Athlete respondents often silently struggled against the sexist attitudes of coaches, but believed they could never safely speak up.

He is the national [sport] team coach. He was speaking to his athletes really grossly apparently... referred to them as ‘prostitutes’ and ‘whores’ and was really gross and not respectful or anything, and a [staff member] brought it to the attention of the

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<sup>32</sup> Kirby, *supra* note 5 at 46 and 85-86; Brackenridge, *supra* note 28 at 211.

<sup>33</sup> Kirby, *supra* note 5 at 46 and 85-86.

<sup>34</sup> *Ibid* at 79 and 83.

<sup>35</sup> Brackenridge, *supra* note 28 at 211.

[provincial sport organization] and then [the national sport organization] fired [the person who complained] and they brought in a new [staff member]. - Athlete Twelve

Inappropriate language and behaviour of this nature are usually representative of larger cultural issues within institutions.<sup>36</sup> Brackenridge states that sexist and discriminatory behaviour should not be seen as individual problems but rather as a reflection of the organizational culture and the sport's history and belief system.<sup>37</sup> Feminist academics point to a sport culture that has, for generations, trained men in dominance, entitlement and traditional concepts of masculinity.<sup>38</sup> Brackenridge writes:

Ridicule, joking, slang-naming of body parts and sexual metaphors are part of the lexicon of sport that often go unchallenged within the sport subworld but that would be deemed completely unacceptable outside it. Unless sports administrators understand the link between sexualized language in sport and sexually exploitative behaviour they are unlikely to challenge what might seem to be 'harmless' norms. It is these harmless norms of the sport subword however, that establish a sexualized climate and legitimize the boundary erosions that lead to sexual exploitation.<sup>39</sup>

Athlete respondents reported that regular repetition of sexualized, offensive or discriminatory behaviour, and the fact that often no one escaped the maltreatment, normalized the maltreatment to the point that it no longer seemed remarkable.

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<sup>36</sup> *Ibid.*

<sup>37</sup> Brackenridge, *supra* note 28 at 31.

<sup>38</sup> Michael Burke, "Obeying Until It Hurts: Coach-Athlete Relationships" (2001) 28:2 J Philosophy Sport 227 at 229; Raewyn Connell, *Masculinities*, 2nd ed (Cambridge: Polity Press, 1995) at 245.

<sup>39</sup> Brackenridge, *supra* note 28 at 211.

Inappropriate jokes, sort of sexual jokes.... Eventually that became normal. The jokes, and then after that there would be a slap on the butt followed by a laugh so everyone thought it was funny. So he normalized all those kinds of inappropriate behaviours. So it started off gently to the point where I think other coaches too were so used to it. He would sit in the van and just reach over and grab one of the girls' boobs. For whatever reason everyone was laughing. He would laugh; we would all laugh. - Athlete Five

He slapped me on the butt and thought it was funny. Behaviour like this is accepted in our federation and in our sport - Athlete Nine

Because there were others [being treated the same way] it seemed okay. - Athlete Two

Athlete respondents suggested that acceptance of maltreatment behaviours also spread to peers, parents, and other coaches. Academics have suggested that this is a common pattern.<sup>40</sup>

[Senior athlete] would watch this interaction with me and [although she knew about the previous incident] she didn't say anything. - Athlete Eleven

People said [about the sexually abusive coach], 'That is just his personality, he's charismatic and loud'. - Athlete Five

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<sup>40</sup> Kerr, *supra* note 18 at 28.

Unfortunately, acceptance and normalization of maltreatment not only make bystanders unlikely to speak up, they also further empower and enable the perpetrator.<sup>41</sup>

Daily touching was normalized. - Athlete Two

They know this coach has done things in the past and still not gotten caught. [So why would anyone speak up?] - Athlete Twelve

The other coaches got used to the sexualized behaviour and everyone was laughing.... Athlete Five

Normalization of inappropriate behaviour may occur more quickly and easily when athletes are young, naive or particularly vulnerable.

At 15 and 16 years old there is no way I could tell if that was right or wrong because it was the only experience I had in life about being coached, and this guy was so successful, so loved by everyone, and I felt like crap. So I was like, he is right and I am wrong. - Athlete Ten

Sometimes personal boundaries may be crossed without question because there is a hands-on coaching tradition in the sport that leads to widespread professional acceptance of non-consensual touching.

There were blurred lines because of the connection between sport and the body... The body is a tool that needs to be tuned. It is controlled by coaches. They have access. - Athlete Four

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<sup>41</sup> Victoria Roberts, Victor Sojo & Felix Grant, "Organizational Factors and Non-Accidental Violence in Sport: A Systematic Review" (2019) *Sport Management Review* 8 at 10, online: <<https://www.sciencedirect.com/science/article/abs/pii/S1441352318304455>>.

Other seemingly harmless behaviours often associated with a male dominant sport culture can make athletes more susceptible to all kinds of maltreatment including sexual abuse. Liberal attitudes toward drinking, partying, and “joking” with athletes,<sup>42</sup> and casual sexual encounters between athlete peers, and athletes and coaches, are suggestive of a sexualized sport environment and lack of appropriate boundaries. These behaviours may not be intentionally harmful<sup>43</sup> but are likely to increase opportunities for inappropriate interactions.<sup>44</sup>

Incidents like that were just treated as normal. Especially at these training camps...Every Saturday night there would be drinking. Like the coaches would be drinking, the athletes would be drinking. Something always happened then.... Like one of the coaches is in his thirties, I don't know if they actually had sex or if he just made out with her, with a seventeen year old athlete who was a friend of mine. Like they hooked up. And then this female coach who was hooking up with one of the national team guys and then she slept with one of the younger junior guys.... Like who was going to address it? Them?... They didn't think it was wrong. - Athlete Twelve

An organizational culture that downplays maltreatment and inappropriate behaviour will often spread this acceptance throughout the organization.<sup>45</sup> Athlete respondents described a relaxed and liberal sport culture where coaches felt comfortable providing drives, inviting athletes to their homes, supplying underage athletes with alcohol, engaging in

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<sup>42</sup> Jan Toftegaard Nielsen, “The Forbidden Zone: Intimacy, Sexual Relations and Misconduct in the Relationship Between Coaches and Athletes” (2001) 36:2 *Int Rev Sociology Sport* 165 at 174 and 179.

<sup>43</sup> *Ibid* at 170.

<sup>44</sup> Burke, *supra* note 38 at 236; Toftegaard Nielsen, *supra* note 42 at 174.

<sup>45</sup> Roberts, *supra* note 41.

inappropriately personal and sexual conversations with athletes, and in some cases, watching pornography with athletes.

[Coach] was feeding kids drink's at [another coach's] wedding, underage kids. He was changing in front of the other kids in the change room and blatantly exposing himself.... He was showing his abdominal muscles off to other boys to show them that he was more cut than they were, lifting his shirt up. There were some sexual things that were happening at parties at his house because after awhile he somehow had [athlete] and [athlete's] mother move in with him. Then they would have other boys invited over. One of the boys that got invited over numerous times, his parents finally pressed charges.... There is a thing out there called a pocket pussy that boys will masturbate with and they were all taking turns masturbating with it. - Parent Two

A sexualized sport environment can sometimes be enhanced by a traditional lack of clothing in some sports and a, perhaps inescapable, focus on the physical body.<sup>46</sup> This is something many of the athlete respondents struggled with. Many athletes felt that women's athletic clothing is frequently more sexualized than mens' and they were all uncomfortable with the way female athletes' bodies are habitually sexualized.

My first sexual awareness of my body was through sport.... The girls use their sexuality.... The one shot deal makes them desperate. - Athlete One

The first thing that is wrong with women's sport is the uniforms and the [sexualized] clothing designed for women.... There was a picture of [my teammate in an international competition on an official sport page] and you know how you can click 'see

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<sup>46</sup> Laura Robinson, *Black Tights* (Toronto: Harper Collins, 2002) at 50-52.

translation'?... So she clicked and they were all like, 'I don't know if I would F— her, would you?'" - Athlete Twelve

It's almost like an expectation that when you get to a certain level of sport that you are wearing stuff that you know [is sexualized]... You see a lot of sport celebrities in sexualized poses, posing for Sports Illustrated. You are the fastest woman. You are the best athlete. You don't have to do that. - Athlete Eleven

Sometimes the sexualization of female athletes is also intentionally driven by sponsors.

We had to look pretty for sponsors and act a certain way. - Athlete Seven

Female athletes, in particular, may also find that their vulnerability is increased by financial constraints in their sport. One athlete respondent described how lack of options, and insufficient financial investment in female athletes in her sport, limits the abilities of women athletes to make independent decisions thus keeping them, and to a lesser extent their male peers, beholden to sponsors, coaches and technicians.

The athletes that were sponsored, they were getting money from outside the national team system. They were treated a whole lot better. You could tell they were like empowered. I think athletes know they are stuck on this path, the national team path and I think it makes them very exploitable... The dynamic of teams and coaches and the dynamic of selections and the kind of having a one-shot deal. I think all of those things make [her sport] so vulnerable to that kind of thing [athlete sexual abuse]. - Athlete One

Many athlete respondents and parents talked about challenges associated with being part of a gender minority in male dominated sports and how they had to fight to be heard and respected.



I think the culture of the men and the coaches is the problem....They are not honouring at all that these girls are two of the top in the country. They look down on them.... There is no appreciation whatsoever [of the difficulties experienced] travelling as the sole female when you have six, seven, eight guys all travelling together. That does have an impact. It does matter to have teammates around you.... [Female athlete] spent probably 50% of the last three years alone on the circuit. Coaches don't seem to understand from a [female athlete] perspective. - Parent One

Female, LGBTQ, members of racial minorities, and athletes with physical and mental disabilities are all subjected to higher rates of bullying, harassment and abuse within their sport environments.<sup>47</sup> Fasting suggests that many female athletes still feel unwelcome in sport, but there are no available statistics on how many female athletes actually drop out of sport because of this.<sup>48</sup>

The lack of women in sport coaching, leadership, governance, technical roles, and high profile media positions further perpetuates this problem.<sup>49</sup> The Canadian Association for the Advancement of Women and Sport and Physical Activity (CAAWS) released a report in 2016 which indicated that females are less involved than males at all levels of Canadian sport.<sup>50</sup> Forty-one percent of girls under age seventeen do not participate in

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<sup>47</sup> Paulo David, *Human Rights in Youth Sport: A Critical Review of Children's Rights in Competitive Sports* (London: Routledge, 2005) at 95; Kari Fasting & Trond Svela Sand, "Narratives of Sexual Harassment Experiences in Sport" (2015) *Qualitative Research in Sport, Exercise & Health* at 14; Kirby, *supra* note 5 at 79.

<sup>48</sup> Fasting, *supra* note 47 at 14.

<sup>49</sup> Fasting, *supra* note 6 at 46.

<sup>50</sup> "Women in Sport: Fueling a Lifetime of Participation - The Status of Female Sport Participation in Canada" (March 2016) Canadian Association for the Advancement of Women and Sport and Physical Activity, online: <[https://womenandsport.ca/wp-content/uploads/2020/03/Fuelling-a-Lifetime-of-Participation-Report\\_Canadian-Women-Sport.pdf](https://womenandsport.ca/wp-content/uploads/2020/03/Fuelling-a-Lifetime-of-Participation-Report_Canadian-Women-Sport.pdf)>.

sports.<sup>51</sup> The vast majority of positions as coaches (68-99%), athletic directors (72%), and sport organization board members (62-73%) are filled by males.<sup>52</sup> Women's sport occupies only four percent of television sports programming.<sup>53</sup> The Coaching Association of Canada's Chief Executive Officer, Lorraine Lafrenière, says that everything from social networking to the coaches' communication styles contributes to a system that is less accommodating of the needs of female athletes than of male athletes.<sup>54</sup>

Women's advancement as athletes is also undermined by the disproportionate social value, sponsorship backing and financial reward apportioned to successful male athletes and to male sports teams.<sup>55</sup> For example, a 2019 international women's cycling race was literally halted in order to allow men at the back of the men's race to avoid being overtaken by the lead women cyclists.<sup>56</sup> Women cyclists were also apportioned only 67 Olympic berths for the 2020 Olympics, as compared to 130 cycling spots for men; fewer than half as many.<sup>57</sup>

In addition to struggles for recognition and funding, athlete members of gender minorities almost always have less power than male athletes in the same sport, which may further increase the power imbalance in the athlete-coach relationship. This athletic vulnerability was emphasized by a study which looked at the power dynamics between coaches and

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<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> Hedy Fry, "Women and Girls in Sport" (June 2017), House of Commons, Standing Committee on Canadian Heritage, online: <<https://www.ourcommons.ca/Content/Committee/421/CHPC/Reports/RP9068268/chpcrp07/chpcrp07-e.pdf>>.

<sup>55</sup> Doyle Rader, "Skylar Diggins-Smith Speaks Out Against Unequal Pay", *Forbes* (27 Aug 2018); Rachel Bachman, "Notre Dame Coach Goes Viral with Attack on Gender Inequality", *Wall Street Journal* (4 April 2019).

<sup>56</sup> Adam Frisk, "Women's Cycling Race Forced to Pause After Female Rider Catches Up With Men", *Global News* (4 March 2019).

<sup>57</sup> Kathryn Bertine, "Hey UCI: Your Sexism is Showing; In Its Latest Example of Discrimination, The UCI Gave Women Half as Many 2020 Olympic Spots as Men", *Bicycling.com* (22 Nov 2019), online: <<https://www.bicycling.com/racing/a29848228/uci-women-olympic-spots/>>.

elite female cyclists in Australia.<sup>58</sup> The Zehntner study exposed abusive coaching practices at an elite training camp, and examined reasons for female athlete buy-in, and the role of senior sport administrators and media in excusing and normalizing the maltreatment of female athletes.<sup>59</sup>

The study noted that power imbalance can exist, not just between athletes and coaches, but also in the athlete's relationship with their sport governing body.<sup>60</sup> In this case, extreme training and team selection strategies were designed to "...mentally and physically break these girls down and get them to their breaking point.... It's brutal and they're going to feel like they're in a living hell."<sup>61</sup> Notably, the coaches recognized the reason they could get away with such an approach was that the women's sport of cycling is relatively new, lacking in funding, and does not have the established status and culture of the men's sport of cycling.<sup>62</sup>

The women athletes in the study willingly subjected themselves to five days of isolation, deprivation and relentless training exercises, intended to test their mental and physical toughness.<sup>63</sup> The cyclists were sleep deprived, emotionally bullied and consciously pitted against one another.<sup>64</sup> For the most part, the women athletes appeared to buy into the selection methods.<sup>65</sup> As was acknowledged, by a sport psychologist for the Australian

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<sup>58</sup> Chris Zehntner, Kerry R McGannon & Jenny McMahon. "Control, Consent and Complicity in the Coaching of Elite Women's Cycling in Australia: A Media Analysis" (2019) 24:5 Sport Education & Society 520.

<sup>59</sup> *Ibid* at 523.

<sup>60</sup> *Ibid* at 521.

<sup>61</sup> Gilmore cited by T Palmer, "The Extreme Methods and Measures at the Australian Women's Development Team Selection Camp", *Cycling Tips* (April 2015), online: <<https://cyclingtips.com/2015/04/extreme-methods-australian-womens-selection-camp/>>.

<sup>62</sup> M Barras, "In Defence of the AIS Selection Camp Process", *Cycling Tips* (12 May 2015), online: <<https://cyclingtips.com/2015/05/in-defence-of-the-ais-selection-camp-process/>>.

<sup>63</sup> Zehntner, *supra* note 58 at 528.

<sup>64</sup> *Ibid* at 527.

<sup>65</sup> *Ibid*.

Institute of Sport, tactics like these would never be successful with male athletes because men would not stand for it.<sup>66</sup>

Elite male cyclists have sponsorship and competition options so they would be unlikely to willingly subject themselves to abuse for the opportunity to compete in their sport.<sup>67</sup>

The situation is entirely different for women. “Funding is so difficult to come by for female cyclists and the desperation of athletes to achieve selection suggests that ethical considerations might be overlooked by athletes in favour of a focus on achieving a prized place on the team.”<sup>68</sup>

The Zehntner study concluded that marginalized groups are at a considerably greater risk of sport maltreatment and that they may even buy into and celebrate their own maltreatment, as may the sport media.<sup>69</sup> Athlete respondents similarly believed that coaches had complete control over their sport destinies and this power imbalance contributed to their compliance. Athletes and athlete parents habitually defer to this power and to the greater knowledge and expertise of coaches.<sup>70</sup>

Coaches have this god-like power for some reason. - Athlete Nine

[Coach] was a very very powerful manipulator, so he could spin any story he wanted and he had all of those parents kind of wrapped around his finger so he had a lot of power over the parents as well. - Athlete Four

I think they want you to know they are the more powerful one on the team because then you will not go behind their backs and do things without them or kind of make your own decisions because

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<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid* at 528.

<sup>69</sup> *Ibid* at 529.

<sup>70</sup> Roberts, *supra* note 41 at 9.

I think it is bad for their reputation if they have an athlete that kind of goes on their own and makes their own plans or does things themselves and is successful and then it looks like, well what did the coach do? - Athlete Eight

Many athlete respondents talked about how they were drawn into a calculated grooming process. The athletes sometimes referred to this as brainwashing. The brainwashing, or subjection, was able to take place because of the power imbalance, and the manipulation and control that had set the stage.<sup>71</sup>

And yes I'm 27, and it's hard to believe that at this age I can fall madly in love with a girl of 15 years, but why I really love you is because of this superb chemistry that exists between us. I would never have pretended to love a 15 year old since the consequences could be dangerous. I will only ask you a few things, **not to show this letter to anyone** (I think you understand).” - Convicted Alpine Ski Coach, Bertrand Charest, in a letter to one of his athletes (translated from French, emphasis added).<sup>72</sup>

Athletes may be so drawn into a grooming process that they, like the Zehntner cyclists, actually embrace their maltreatment. As athletes they are also trained to submit to a coach’s authority.<sup>73</sup> Several of the athlete respondents described the lengths they went to in order to protect their abuser. For some athletes, it took years before they were able to see that their coach-athlete relationship had not been a healthy one.

So many athletes asked me, ‘Is this happening? Is this happening?’ and I was kind of brainwashed to not express my truth. So, yes it was normalized, and yes it was part of everyday

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<sup>71</sup> Burke, *supra* note 38 at 229; Zehntner, *supra* note 58 at 527.

<sup>72</sup> *Charest c R*, 2017 QCCA 2048.

<sup>73</sup> Burke, *supra* note 38 at 232; Zehntner, *supra* note 58 at 523.

life and it continues throughout. It is just rampant, and yes at the same time I knew it was wrong, but I didn't have the ability to speak up. - Athlete Four

He told me that coaches and athletes, it is like a marriage. Like you still fight but at the end of the day you don't bring other people into it and you don't tell anyone about it and what happens in the team stays in the team. - Athlete Eight

We believed the people who didn't like him were wrong.... Why didn't I do anything? I should have done more. [I was thinking] he is so successful and loved, he is right. - Athlete Ten

At both the individual and institutional levels, power imbalance, lack of funding, sexualized climate, inappropriate boundaries, gender discrimination and exclusionary behaviour, sexist and homophobic jokes, and the normalization of all of these things, are characteristics of a hegemonic male sport environment that contributes to the vulnerability of athletes and increases the potential for athlete maltreatment and sexual exploitation in sport.<sup>74</sup> Sponsor pressure to perform duties as sport ambassadors, and make unpaid appearances at public events, can force athletes to take on these roles regardless of their personal wishes. This further diminishing of athlete autonomy contributes to increased risk for athlete maltreatment.<sup>75</sup>

Aggressive and manipulative coaching tactics are more likely to occur in a male hegemonic sport environment and these forms of psychological maltreatment may cause considerable psychological distress.<sup>76</sup> Athlete respondents often did not recognize the behaviour as abuse at the time.

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<sup>74</sup> Brackenridge, *supra* note 28 at 21.

<sup>75</sup> Kirby, *supra* note 5 at 108.

<sup>76</sup> Zehntner, *supra* note 58 at 530; Crooks, *supra* note 17; Kerr, *supra* note 18 at 28.

Verbal abuse was to be accepted as motivational coaching. Time and again, we listened to male coaches berate our daughters during training – calling them stupid, lazy, not worth their time, shit players. - Parent Three

He was mentally abusing every girl he coached; bottom line. He had erratic behaviour. He would do crazy things. - Athlete Seven

Psychological maltreatment is often believed to be a technique for developing essential athletic mental toughness.<sup>77</sup> The widespread acceptance and normalization of this behaviour means that is rarely reported.<sup>78</sup>

I ended up coming 12th and my coach came up to me and was like, you are a disappointment to this team.... They do not use appropriate language a lot of the time. That is all we know [yelling]. I have often been yelled at by a coach.... It is a weird normal. - Athlete Eight

The night before her big event... her coach came up to her and said, you know, I just don't think you have what it takes... the night before an event where they thought she would podium. - Parent One

One infamously psychologically abusive coach, Bela Karolyi, is credited with coaching more Olympic champion gymnasts than any other coach in history.<sup>79</sup> Karolyi is said to have intentionally pitted girls against each other, belittled them and regularly called them “stupid” or “fat”.<sup>80</sup> He would allegedly retort, “It isn't golf!” if they complained, and he

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<sup>77</sup> Michael J Reynolds, “A Theoretical Exploration of the Relationship Between the Expectations of Sports Coaches and the Physical and Emotional Health of Athletes” (2000) 3:2 J Science & Med Sport 51; Zehntner, *supra* note 58 at 527.

<sup>78</sup> Kerr, *supra* note 19 at 8.

<sup>79</sup> Ryan, *supra* note 14 at 150.

<sup>80</sup> *Ibid* at 27.

encouraged them to drop out of school and do their studies by correspondence so they could spend more time training.<sup>81</sup> His former team trainer, Jack Rockwell, said that Karolyi was a cruel coach who frequently pushed young athletes to train and compete when sick or injured.<sup>82</sup>

Although USA Gymnastics cut all ties with Karolyi in 2018 because of his reputation for athlete maltreatment,<sup>83</sup> his tactics are still widely copied and employed by other coaches. The majority of athlete respondents and parents related Karolyi-type experiences of physical and psychological maltreatment from coaches who regularly berated athletes, while also frequently withholding rest and pushing athletes to compete while sick or injured.<sup>84</sup>

If we were injured he would have to call the doctor and make sure we had a doctor's note because he didn't believe [us].... At the end we ended up not telling him anything. I would [compete] sick or I would [compete] injured all the time. - Athlete Eight

[The doctor] gave us a prescription for injectable Toradol that we used to try to keep things under control for her but often even that wasn't enough. She carried Percocet and Oxycodone with her as last resort measures. I cannot stress to you what a scary time this was for both [athlete] and ourselves, but because she felt showing weakness was not an option, she kept going. There were many times she would have to leave the [sport venue] to vomit, as the pain was so extreme, but she would continue to push through and

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<sup>81</sup> *Ibid* at 27; Note: Compromised education is a common side effect of athlete maltreatment. It gets less attention than other harms, but can have very real and lasting implications, particularly after retirement from sport.

<sup>82</sup> *Ibid* at 27.

<sup>83</sup> Alice Park, "Why It's a Big Deal That USA Gymnastics Is Cutting Ties With the Karolyi Ranch", *Time* (18 January 2018), online: <<https://time.com/5108887/usa-gymnastics-sexual-abuse-karolyi-ranch/>.

<sup>84</sup> Burke, *supra* note 38 at 232; Mike Hartill, "The Sexual Abuse of Boys in Organized Male Sports" (2009) 12:2 *Men & Masculinities* 225 at 229; Brackenridge, *supra* note 28 at 87.



[compete] the best she could, as this fear of showing weakness to her teammates and coaches was all consuming. - Parent Three

Many of the athlete respondents' descriptions of their maltreatment by coaches are remarkably similar to behaviours attributed to Karolyi, even though Karolyi is often considered to be an extreme outlier in the coaching world.

He would tear you down so like he could build you back up again.... As an athlete all your strengths and weaknesses are on the table and you are like leaving it to this person to improve your weaknesses. And so it is a very vulnerable position to be in. - Athlete Eleven

He was a coach that was very demanding and had lots of expectations for results.... He was really hard on us because when we had good results it made him look good and he took all the credit. I think he tried to kind of sneak in our lives and be controlling. He needed us to feel like we needed him, and so by creating fights with the other girls we would then go to him for advice or support. - Athlete Three

I was too exhausted. I was mentally and physically done. I needed a day off... At the team meeting I got yelled at for making excuses for my poor performances. Like, being exhausted is just a state of mind. 'It's all in your head. You girls are just giving up'. - Athlete Eight

Many athlete respondents felt pressure to demonstrate toughness and to perform through illness or injury. This idea comes from traditional male hegemonic sport principles, and is

often embraced as a valid coaching strategy, but is not founded in science.<sup>85</sup> Requiring athletic toughness, and being dismissive of injuries in sport, gives legitimacy to, and further enables, athlete maltreatment.<sup>86</sup> Some traditionally masculine power and performance sports, such as ice hockey, are known to encourage and even celebrate violence and aggression during the game.<sup>87</sup> This may make it even harder for athletes in those sports to identify maltreatment and speak up.<sup>88</sup>

The more aggressive the sport is, the more aggressive the language and the vocabulary is going to be. I think that guys know that their coaches can get away with it in a more aggressive sport. They can yell more profanity at you and be more aggressive and in your face because that is the way the game is also played. - Male hockey player<sup>89</sup>

Maltreatment of athletes is often rationalized by coaches and onlookers through intellectual-reframing.<sup>90</sup> Some athlete respondents continue to accept the outdated motivational approach that it is a coach's job is to use psychological maltreatment, or whatever means they deem necessary, to push athletes to reach new athletic heights. Many athletes believe that maltreatment often comes from a well-intentioned coach whose primary motivation is to achieve results.<sup>91</sup> Academics, such as Kerr, stress that if the maltreatment is intentional, and harm is caused, good intent is irrelevant.<sup>92</sup>

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<sup>85</sup> Burke, *supra* note 38 at 232; Laura Robinson, *Crossing the Line: Sexual Harassment and Abuse in Canada's National Sport* (Toronto, McClelland and Stewart, 1998) at 56; Kerr, *supra* note 15 at 8; Zehntner, *supra* note 58 at 528.

<sup>86</sup> Roberts, *supra* note 41 at 9; Kerr, *supra* note 19 at 8; Zehntner, *supra* note 58 at 528.

<sup>87</sup> Wendy MacGregor. "It's Just a Game Until Someone Is Sexually Assaulted: Sport Culture and the Perpetuation of Sexual Violence by Athletes" (2018) 28:1 Education & Law J 43 at 64.

<sup>88</sup> Kirby, *supra* 5 note at 14.

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

<sup>90</sup> Roberts, *supra* note 41 at 10.

<sup>91</sup> Kirby, *supra* note 5 at 146

<sup>92</sup> Kerr *supra* note 19 at 3.

I think that one way of coaching to bring the best out in an athlete is to push the comfort zone in a way that is even further than what the athlete thinks he is able to do. - Athlete Ten

Coaches think you need to have hard times and suffer. You need a hard coach. - Athlete Nine

This same coaching philosophy is frequently used to explain away the emotional and physical maltreatment of errant athletes, or their teammates. Coaches sometimes impose physically painful or exhausting training exercises as punishment for misbehaviour. Some may strategically inflict team punishments for individual infractions.<sup>93</sup> These punishments are considered a constructive way to motivate or discipline for rule-breaking, or to punish athletes for insufficient effort.<sup>94</sup>

Karolyi would often choose a teammate to do extra training when one athlete did not perform to his standards. He defended this manipulative coaching strategy by indicating that the strongest would survive and those survivors would be the ones capable of winning.<sup>95</sup> Some athlete respondents similarly experienced punishments being transferred to their peers or the assigning of individual or team extra-training as punishment.

He would be pretty hard on them [male athletes]. And you know if they did something stupid, which teenage guys do, he'd make them go for like ten K runs, like in addition to the practice, and was kind of using his coaching authority to give out physical punishments. - Athlete Eleven

Punishments, threats, manipulation and verbal abuse are all forms of psychological maltreatment. Athlete respondents who had been repeatedly subjected to verbal abuse could often recall the specific words that were used to shame and humiliate them. These

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<sup>93</sup> Ryan, *supra* note 14.

<sup>94</sup> Roberts, *supra* note 41 at 9.

<sup>95</sup> Ryan, *supra* note 14 at 22.

words were often sexually belittling and designed to instill deep personal insecurity. Many athlete respondents suffered lasting damage to their self-esteem and confidence. Abusive coaching techniques of this nature, as well as the strategic withdrawal of support and attention,<sup>96</sup> all contribute to athlete vulnerability and increase opportunity for further manipulation and sexual abuse.<sup>97</sup>

He always knew what to say to get me going, to get me upset. If I was fighting him, or resisting, or saying no to him [sexually], then he would stop coaching me and put me aside, and then I would all of a sudden feel really isolated from everybody. When you are young you need your coach to guide you, to coach you, so that you improve your technique, improve your [sport] to get results, so when you do not have that, you feel totally lost. - Athlete Three

At that age, and our bodies are changing, and you are going through puberty. I think young children are really vulnerable to comments about their bodies, so there was a lot of body image comments that were really derogatory or making fun of, or even sexualized. - Athlete Four

He was calling me names and he was always focusing on little things, like the hair on my arms. He was thinking that I had too much hair on my arms, physical things like that.... He said [when I was competing] I looked like an oyster. I remember him calling me the 'oyster', because he said I was so soft.... I wanted to please him. - Athlete Ten

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<sup>96</sup> Ashley Stirling & Gretchen Kerr. "Defining and Categorizing Emotional Abuse in Sport" (2008) 8:4 Euro J Sport Sci 173 at 180.

<sup>97</sup> Kerr, *supra* note 19 at 5 and 8; Toftegaard Nielsen, *supra* note 42 at 169; Kennedy, *supra* note 3 at 74.

An exaggerated power imbalance, sexualized training environment and reliance on outdated punitive and manipulative coaching strategies do not contribute to a healthy atmosphere for any athlete and it is unlikely that coaches who embrace these approaches will successfully motivate their athletes to reach maximum performance results. This leads to the obvious question, why do such coaching strategies persist?

### **5.3.2 Insufficient Education on Maltreatment Issues in Sport**

Many athlete respondents expressed the opinion that abusive coaching strategies and athlete maltreatment occur as a direct result of sport's male hegemonic culture and belief system combined with a widespread lack of education on issues of maltreatment in sport. Lack of training and education on the types of maltreatment and their definitions, the embracing of sport gender-stereotypes, as well as basic conceptual legal misunderstandings, all feed the toxic sport environment described by many athlete respondents.

Lack of athlete education on maltreatment issues means that athlete respondents were often unaware that the behaviours they experienced were inappropriate, or that the behaviours breached sport federation policy, and were, in some cases, criminal. The Kirby study suggested that athletes tend to deny their vulnerability and dismiss incidents, sometimes only identifying harassment or abuse long after retirement.<sup>98</sup> This pattern of delayed reporting was confirmed by the 2019 Kerr, Willson study.<sup>99</sup> The Kirby study emphasized the need for athlete education in order to help recognize maltreatment in sport.<sup>100</sup> Many athlete respondents said they did not comprehend the extent of their maltreatment at the time.

It wasn't until one of the girls came out, I think to the media, and talked about how fast he used to drive the van and play chicken

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<sup>98</sup> Kirby, *supra* note 5 at 48.

<sup>99</sup> Kerr, *supra* note 18 at 22.

<sup>100</sup> Kirby, *supra* note 5 at 42, 43 and 49.

on the roads that I was like, oh yeah, that happened too. Just so many things happened that I wouldn't have put into this mix. I was like, oh my gosh, he almost killed us every day.- Athlete Seven

Athlete respondents were often intuitively aware of the inappropriateness of doing athletic performance reviews alone with a coach in a hotel room, coaches giving athletes drives home in their cars, or coaches and athletes not wearing appropriate amounts of clothing, but none of the athlete respondents believed there was a means available to them to address these discomforts.

The [head coach] in particular, I don't think he should ever be shirtless, but he always was. And we would sit side by side on the couch doing video reviews in the hotel rooms all the time and that was pretty normal.... He just did not think that would make me feel uncomfortable.... It is just such a, I don't want to say intimate relationship, but you also get tested by your coaches for fat for example. So there are no boundaries. - Athlete Twelve

Lack of education on their rights as athletes and the professional responsibilities of coaches meant that many athlete respondents, parents and community members frequently believed, and some continue to believe, that the athletes shared responsibility for the maltreatment they experienced.

I felt responsible. - Athlete Three

I was protecting him and thinking I was in the wrong. I thought it was my attention seeking and that I had put myself in the position.... - Athlete Four

Athlete guilt is often heightened by a belief that they were complicit in their own maltreatment. In some cases athlete respondents thought they were in love with their coaches and they may have even encouraged the sexual involvement.

He said that we had special chemistry, that he wanted to marry me, he wanted to have children with me. He wanted to buy land and have a farm and live our life together. So it was very dreamy.... As a fourteen year old who is seeking attention, seeking love.... I did not know any better, to know that this was wrong. - Athlete Four

I think that you just feel like you are so ashamed.... We felt like we were the bad girls. - Athlete Five

I kind of let it happen. This is the guilt.... I think I was not equipped. I was not mature enough to know that it was wrong and to stop it.... - Athlete Six

Athlete respondents and their parents often regarded the complaint process as futile, stacked against them, and having the potential to create divisiveness and backlash from teammates and the sport community. Respondents suggested that parent and athlete education on the various options for registering official maltreatment complaints could help increase reporting.

Coaches had absolute authority over our daughters and it was believed that dissenters (or anyone who questioned anything) would be dropped from the team.... [They] created an intense culture of fear and mistrust amongst the players and parents along with an unhealthy competitiveness between the players that, at times, led to posturing and bullying.... The fear of being singled out as a disruptive parent - placing my daughter's status on the team in jeopardy, and my daughter's fear of losing all opportunity to play or make friends kept me silent. In retrospect, I realize that I allowed my daughter to be sent the message that there are times when it is ok for a man, in a position of authority, to dominate and verbally abuse her for fear of the power he held to destroy her dreams if she protested in any way. - Parent Three

Many athlete respondents said that the actions of their sport federations and the sport communities revealed a lack of understanding of athlete maltreatment issues and the applicable law.

I just think that was the culture. They didn't actually think it was bad.... If you look at [the sport] and you look at the girls who were a little bit older than us... how many of them have slept with their coach? This is the culture. Like this is fairly normal. The only thing that made people say, 'Oh this is not normal' was that he was sleeping with three athletes.... So yeah, I think the culture absolutely condoned it from the [lower sport organization levels] to the [higher sport organization levels]. - Athlete One

Athlete respondents reported that their sport communities, including athlete peers, were often not supportive of athletes who dared to complain about coach maltreatment. Studies have also indicated that male athletes may be more likely to embrace negative stereotypes about women than their non-athlete peers.<sup>101</sup> Sociologist Lisa Wade says that student athletes, when compared to non-athletes, tend to identify more strongly with masculine hegemonic culture, and are more likely to exhibit confusion about issues of consent.<sup>102</sup> Many athlete respondents described their sport culture as a place where fellow athletes and others in the sport community frequently made comments that revealed a lack of education on issues of sexual consent.

There were pictures that got on the internet, this is five or six years ago, and they said it was [female athlete] nude. It wasn't

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<sup>101</sup> Belinda-Rose Young et al, "Sexual Coercion Practices Among Undergraduate Male Recreational Athletes, Intercollegiate Athletes, and Non-Athletes" (2017) 23:7 *Violence Against Women* 795 at 797; Sarah K Murnen & Marla H Kohlman, "Athletic Participation, Fraternity Membership, and Sexual Aggression Among College Men: A Meta-analytic Review" (2007) 57:1 *Sex Roles* 145 at 146.

<sup>102</sup> Lisa Wade, "Rape on Campus: Athletes, Status, and the Sexual Assault Crisis" (6 March 2017), *The Conversation*, online: <<https://theconversation.com/rape-on-campus-athletes-status-and-the-sexual-assault-crisis-72255>>; Lisa Wade, *American Hookup: The New Culture of Sex on Campus*, (New York: WW Norton & Co, 2017).



[female athlete] at all, but after we tried to get to the bottom of it one of the female coaches said, 'Well, she asks for it, she wears a lot of makeup'. - Parent One

Many of the athlete respondents themselves, including those who were subjected to sexual assault or sexual abuse, did not understand that their coaches had committed crimes.

I didn't know anything about consent, anything about sex offences. - Athlete Twelve

Most athlete respondents were unclear on the legal and administrative protections that were available to them.

We are scared and ashamed. We are not educated on what we can do and how it works. We do not have a support system. - Athlete Six

Confusion on legal concepts and athlete rights was common among the athlete respondents. Athlete Two abandoned her career when she was still a minor, because of her coach's conduct and its impact on her physical and mental wellbeing, but she did not report her coach's behaviour because she assumed she was partly to blame and because he never had penetrative sex with her so she did not think a crime had been committed.

He would take me for solo car rides and he would have his hand on my leg and he was talking about my family and my boyfriend and like sexual experience and stuff like that.... It was daily, whether it was like touching or making comments about again, my body. If he did individual video with you, he would make a point of sitting close to you and you know rubbing our [*sic*] back.  
- Athlete Two

There was widespread misunderstanding about the definition of sexual assault. Several athlete respondents implied that sexual assault would require penetrative sexual

intercourse and most believed that sexual intercourse between a coach and an athlete, who was over 18 years of age, would not be considered a crime if the athlete did not actively resist.

I had a full mental breakdown and I had to come home.... I never wanted them [parents] to say anything because I never had sexual relations with him.... So I felt like I never had anything to complain about. It was like what I was feeling was not valid because he did not rape me.... I sometimes wished he had done something more physical to me so I could associate the amount of pain I was having with a physical act. - Athlete Two<sup>103</sup>

I didn't even know that what happened was sexual assault. -  
Athlete Eleven

There was a lot of uncertainty surrounding what constitutes consent, what kinds of behaviour are considered sexual harassment or sexual assault, when inappropriate behaviour warrants reporting to authorities, and who can legitimately report such incidents. (These concepts are discussed in Chapter Two, Law and Legal Policy as well as in Chapter Six, Recommendations.) This legal confusion created a lot of mental suffering for athletes who were over 18 when they were sexually abused.

Dad never believed how bad it was.... He wants to believe his daughter, but I think they sort of took the 'Well, you were 18. You should have known better.' approach. - Athlete Seven

[Onlookers] tend to say, well she was 18.... Oh well, she was 17 and a half, whatever.... Then [in a relationship of trust] it's

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<sup>103</sup> This athlete was a minor who never believed she had a case against her coach in spite of the fact that her coach touched her inappropriately and regularly had sexualized conversations with her. She knew that he had sexual relationships with some of her teammates and this, along with his pattern of psychological maltreatment, created a poisoned sport climate that led her to give up her international athletic career. She suffered long term consequences that required psychological treatment.

actually 19 which none of us knew. - Athlete One (Note: This explanation is not legally accurate.)

Sometimes the pain, shame and confusion that accompanied these legal misunderstandings was evident.

I was told that basically [in order to initiate criminal charges] I had to have been under 14 years of age and he had to physically rape me.... When I became involved with him I was 18 and so most of my shame and everything in the last 20 years has to do with the fact that I was older and I should have known better.... A lot of [criminal law] pertains to minor athletes, and I one hundred percent respect that, but in my experience, abuse of power, the manipulation and coercion, the brainwashing, like it could have happened to a 50 year old woman as easily as a 16 year old. - Athlete Seven

Even when athletes understood that a crime was being committed by their coach, they often did not feel that it was their place to speak up on behalf of peer athletes.

I did not really have a direct complaint against them [national sport organization] in the way some of the other girls did.... There was no rape, no sex.... I would never have told this story.... Yeah, it wasn't for me to say.- Athlete One

Social misconceptions in the community, and the way maltreatment and sexual abuse stories are reported by the media, frequently caused a lot of pain and mental suffering for athlete respondents. One example of this was demonstrated when media stories focused on an accused coach being acquitted on charges that did not meet jurisdictional requirements. The complainant felt that she had wasted her time, and had unnecessarily subjected herself to public criticism and ridicule, by testifying in court.

He was acquitted of them, for my particular charges, because every actual sexual act that occurred happened overseas so my

charges were out of jurisdiction. So that was a hard pill to swallow.... One of the main headlines was that even though he was acquitted of our charges, we have still decided to come forward and my heart just like sank, because I go into that place where I am like oh my God, everyone is going to think he didn't do anything wrong to me. So why am I bothering? - Athlete Seven

In some sports, athletes reported that it has long been an accepted part of the sport culture for coaches to be dating, sleeping with and sometimes even marrying athletes.<sup>104</sup> Lack of community and sport-wide education on appropriate boundaries was sometimes identified as contributing to the problem.

There was a lot of drama that went from people pointing fingers, everyone knew about [the coach-athlete relationship], why was it allowed? It tore a family apart completely.... [Head of provincial body] apparently was very aware of it and let it go.... They are still married, which is nice, so it turned out nice, but a huge issue, horrible for the family; [the athlete was] 18 years old. - Parent One

The issue of consensual athlete-coach relationships frequently provokes conflicting public opinion and confusion. This was true among athlete respondents some of whom believed, at the time, that their own coach-athlete relationship had been consensual.<sup>105</sup>

I had a crush on him, like a relationship. I let it happen. I thought my parents would kill me. I wanted to please him. I would do anything he said. - Athlete Six

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<sup>104</sup> Robinson, *supra* note 46; Kirby, *supra* note 5 at 53.

<sup>105</sup> Susanne Johansson, "'Am I Sexually Abused?' Consent in a Coach-Athlete Lesbian Relationship" (2018) 23:4 Sport Ed & Society 311.

The predominant current academic view, is that sports teams should be treated like a professional place of work and if two consenting adults wish to carry on a romantic relationship, one of them must first resign from their sport position or they will be forced to do so.<sup>106</sup> This is what happened, for example, when the CEO of McDonald's was recently forced to resign from his job after it was revealed that he was engaged in a consensual relationship with a professional subordinate.<sup>107</sup>

Rationale for bringing this principle into practice in sport organizations is supported by the inherent power imbalance in almost any athlete-coach relationship, as well as the unavoidable negative impact of coach-athlete relationships on teammates.<sup>108</sup> Kirby explains that athletes are naturally dependent on their coaches, therefore any coach who initiates a sexual relationship with an athlete is in direct breach of that trust relationship. The situation is further complicated by power imbalance, the coach's ability to control athletic destiny, and the athlete's potential perceived inability to reject the coach's advances.<sup>109</sup>

Special treatment and extra privileges often associated with coach-athlete relationships can raise resentment and conflict among teammates.<sup>110</sup> Kirby says that when an athlete has a romantic relationship with a coach they may sometimes find themselves being penalized by the coach as a form of public overcompensation. Team cohesiveness is inevitably damaged and athlete confidence may be harmed because they may believe their athletic success was tied to their sexual availability.<sup>111</sup>

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<sup>106</sup> Kerr, *supra* note 19.

<sup>107</sup> Associated Press, "McDonald's CEO Steve Easterbrook Pushed Out Over Relationship With Employee" *CBC News* (3 Nov 2019); Kerr, *supra* note 19.

<sup>108</sup> Kirby *supra* note 5 at 53.

<sup>109</sup> *Ibid* at 51.

<sup>110</sup> *Ibid*.

<sup>111</sup> *Ibid*.

Several athlete respondents indicated that they went along with a sexual relationship with their coach because they felt that their sexual participation was necessary if they were to achieve their athletic goals.

He had me convinced that this was part of the job, which I know sounds so crazy now. This [sexual relationship] was part of the program to be an athlete of his. - Athlete Seven

I think back, and I put up with so much [repeated sexual abuse], thinking this is what I needed to do to achieve, but it was super unhealthy. - Athlete Three

The state of mind of athlete sexual abuse victims has sometimes been compared to that of religious cult members who engage in sexual relationships with cult leaders because they believe that he has ultimate power over their lives and their destinies.<sup>112</sup> Perhaps athlete education on maltreatment would not impact those who are under a cult-like spell, but the education of other coaches, parents, administrators, sport professionals and community members about the responsibility to speak up, and the potential for liability if they do not, could be a game changer.

#### **5.3.4 Self-Regulation of Sport Organizations**

Sport self-regulation continues to be widely practiced and this is another contributing factor to the often dramatic power imbalance between athletes and their coaches and their sport organizations. Athlete respondents often blamed self-regulation for their refusal to report maltreatment incidents because they did not see their sport authority as a safe, confidential or neutral place to report behavioural breaches. Athlete respondents generally assumed that the sport organization, athlete peers and parents would support the coach rather than the athlete.

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<sup>112</sup> Joe Navarro, “Dangerous Cult Leaders :Dangerous Traits of Cult Leaders”, *Psychology Today* (25 Aug 2012); Burke, *supra* note 38 at 231.

If you go against a national team athlete or a coach, or even if I had spoken up about the coach who slept with the junior team [athlete], if I had mentioned that, I also would have had the wrath of all [the] other athletes and all the parents who liked [that] coach. - Athlete Twelve

Three of the athlete respondents did report their maltreatment directly to their sport authority. They all suffered personal and athletic repercussions, which one might speculate, could have been avoided if they had been able to report to an independent authority.

It won't be easy [for me in the aftermath of my complaint] let's say... just because maybe they are going to have prejudiced views about me.... They might never know the true story.... They will just never consider me for certain events. - Athlete Nine

Many suffered verbal abuse and bullying from their athletic peers when the sport community sided with the coach.

[Their teammates said] Bitches! [Coach] has problems.... [They said] it's all your fault. You are the problem. You split the group. - Parent Two

[When we complained about the abuse] the older athletes asked us, 'What is your problem?' - Athlete One

Having them [peers] think really horrible things about you and saying horrible things about you is tough.... I even had grown adults saying things, calling me a slut. - Athlete Eleven

Skilled high level coaches can be hard to find. Coaching can require a huge time commitment, and a considerable amount of time away from home without huge financial reward. Several athlete respondents mentioned that it was the stated position of their sport organization that they gave coaches preferential status as employees of the organization.

This practice is able to continue because self regulation means that there is no independent authority checking on whether all parties to a dispute are being treated equally.

I thought there were [measures to protect athletes]. That is why I came forward with it, but it doesn't seem like it. It seems like they want to dot their i's and cross their t's but they are not actually looking out for me.... Coaches are actually employees so they made it clear to me at the beginning, right away when I talked to them on the phone. They need to, first of all, do everything to make sure that he is not harmed. And I didn't know what would happen, but I as kind of like, 'Oh, I guess so. I don't want him to go to jail or anything. I just don't want to be coached by him.' I think they tried to scare me. - Athlete Nine

Ultimately there are not a million coaches out there that are willing to do this job for the amount of money they make, and travel and leave their families. - Parent Two

A tight budget means they can't pay a lot of money for good coaches. That changes the balance in favour of the coach. - Parent One

Many athletes respondents felt that winning coaches, in particular, are protected at all costs, particularly if they have brought public profile and sponsorship success to the organization. Sport organizations make significant investment in their coaches and it is difficult to replace good coaches. Respondents also suggested their sport organizations would be concerned about what might be said in the community if a coach was suddenly fired.

They were too afraid of what it would do to the organization. It would tarnish the image. I don't think anything else mattered. - Athlete Two



How come [coach eventually convicted of sexual exploitation] never lost his coaching license? How come?- Athlete One

[Our] good results made him look good. He had a lot of success. Everything [sexual abuse of athletes] was tolerated. - Athlete Three

Some athlete respondents speculated that self regulation allows sport organizations to protect their coaches out of fear of litigation from the coach if he was fired, due to practical concerns with finding a new coach, or because of pressure from parents and athletes who wanted to continue training under this coach.

They [sport organization] will protect the coach until the end, but they don't really care what happens to the athletes, which is bizarre. - Athlete Eight

The organizations have disproportionate power. That is ultimately what it boils down to and there is something very wrong and I don't know how you change that. The board does not seem to be the body that protects [athletes] and maybe as part of the board's job, ultimately there have to be people you [athletes] can go to safely. - Parent Two

Though successful athletes, create success for coaches, administrators and sport organizations, the lack of an independent sport authority leaves athletes without representation and as a result they are sometimes considered a short term investment and in many cases they report feeling as if they are disposable. If one athlete leaves, there is another eager to take his or her place. Craggs calls this a "culture of disposability", where athletes feel like "replaceable commodities."<sup>113</sup>

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<sup>113</sup> David Brooks, "If Nice Guys Finish Last", *New York Times* (11 Jan 2008).

[Coaches] are definitely more protected and it didn't just feel like I was taking on the coach, but I felt like I was taking on the whole [sport organization]. And so again that protection kind of goes towards the coach, their employee, as opposed to the [athlete]. Very little protections are put in place to prevent further things happening again.... They could fire the coach but it would be at extreme cost to them.... Members are wanting to know what is happening with the coach but not all members are going to want to know why Sally left.... They are not going to care.” - Athlete Eleven

Assistant coaches may feel that they are also disposable and this makes them less likely to speak up on behalf of athletes who are being maltreated.

She said that she would stick up for me.... She was paid by [national sport organization] and it puts her in in a position where you have to bite the hand that is feeding you.... There is no incentive for them to say something that just makes trouble for them.... - Athlete One

She is looking at it from a point of view where like yeah, I want to be a [national team] head coach.... I don't think she actually understood that it [the sexual harassment] wasn't right.... She is 100% looking for that title. - Athlete Eight

Senior administrative officials at sport organizations usually have long-standing, personal, social and athletic connections to their coaches. Coaches frequently sit on provincial and national sport boards or are close friends with those who do. There is often a tight network of support and interdependence at the executive level and these individuals often believe that the financial and athletic success of the organization is linked to the ability to recruit and keep winning coaches. It is the responsibility of sport organizations to protect their sport from negative media attention, hold onto sponsors,

and avoid litigation.<sup>114</sup> Self regulation allows this bias in favour of coaches to continue even through it directly conflicts with the best interests of athletes.

[Senior official] could see it was happening, but he didn't want to lose good coaches.... There is a brotherhood and it is a male dominated sport.... I was twenty and the director was 40, and his head coach was 40, and they are buddies and he doesn't really want to kick him out, he doesn't want to defame him.... Adults around are not always ready to take action and the victim is so manipulated that they will not fess up. - Athlete Four

They already know that they are not going to be believed or taken seriously. So is it worth trying? They know this coach has done things in the past and still has not gotten caught, so why am I going to effect change? - Athlete Eleven

She wasn't even allowed to talk to her teammates about it. So completely isolated against a board, all the coaches. One athlete against many adults.- Athlete Eight

Many athletes mentioned the tremendous amount of power that the coach had within their clubs and sometimes within the sport organization.

I would probably say in this case the biggest factor was that the coach was running the club. He was running like a private club and the board was allowing it to happen. - Parent Two

Coach] ran the [sport organization]. Like the board of directors did not.... [The board] are all volunteers and usually they are the

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<sup>114</sup> Steven Mintz, "Placing Childhood Sexual Abuse in Historical Perspective" (2012) Social Science Research Council, online: <<https://tif.ssrc.org/2012/07/13/placing-childhood-sexual-abuse-in-historical-perspective/>>.

parents of the athletes that are most into the sport.... There was a lot of turnover.... I can think of at least three or four parents that I know of who just absolutely hated the coach because he really dictated things. - Athlete Eleven

According to some athlete respondents, other coaches, athlete parents and community members sometimes do not speak up because they feel they do not have enough evidence and they do not want to falsely implicate a coach and jeopardize his career. An independent authority would provide for anonymous complaints and investigations that would not put careers in jeopardy.

Sport isn't regulated. There is no oversight by the provincial body, so a lot of behaviour isn't seen and you don't want to act on a rumour. - Athlete Twelve

[Senior officials at organization] are more worried about him [coach] and his family and their future and all of that. - Parent Two

Well there is no one who oversees the sports organization so no one has more power than the sports organizations and these organizations have a lot to lose with bad behaviours from their coaches so they are protecting themselves, so it is very hard for the athletes to report anything.” - Athlete Nine

All athlete respondents identified self-regulation by sport organizations as a major cause and influence in the perpetuation of, and lack of redress for, athlete maltreatment. Athlete respondents suggested that self-regulation frequently increases the athlete-coach power imbalance, which furthers the vulnerability of athletes who may already be reluctant to report maltreatment because of fear of repercussions. Athlete respondents, or parents, who reported athlete maltreatment to a sport authority, unanimously expressed their dissatisfaction with lack of independence during the investigation and hearing process.

It is like their own little world. That must be it. There is no check on their power. There is no one to answer to. It is a very dangerous situation. - Athlete Eleven

I don't know if it is the [provincial sport organization's] responsibility to say, 'We are going to give [coach] a warning and we are going to explain what sexual exploitation is.' What happens then? You just need to have someone in that sport organization who is actually going to be objective and represent the athletes and not the interests of the organization. - Athlete Twelve

When the checker is part of the problem, the system won't work. - Athlete Four

The lack of an official independent authority means that sport organizations usually choose to handle matters internally. This practice continues in spite of official government policy that requires all sport organizations receiving public funding to have an independent male and female harassment officer to receive and investigate complaints.<sup>115</sup>

The whole team has one rep that they share.... now his role has more responsibilities, and responsibilities [directly to sport organization] which is weird. It is like he is wearing two hats.... [We need] a council [independent authority] where we can report to instead of reporting to one person who is this alumni of the team who does [unrelated field of work] and is in way over his

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<sup>115</sup> Peter Donnelly & Gretchen Kerr. "Revising Canada's Policies on Harassment and Abuse in Sport: A Position Paper and Recommendations" (2018) Centre for Sport Policy Studies, online: <[https://kpe.utoronto.ca/sites/default/files/harassment\\_and\\_abuse\\_in\\_sport\\_csps\\_position\\_paper\\_3.pdf](https://kpe.utoronto.ca/sites/default/files/harassment_and_abuse_in_sport_csps_position_paper_3.pdf)>.

head and doesn't know what to do with a sexual harassment claim.... He has no idea what he is doing. - Athlete Nine

I got the sense that if she got quantitative results then it is like crap, now we have to take action.... It sounds like they are trying to deal with these problems, but very quietly. If she has some abuse allegations, I don't know why she doesn't go to the police.... I am finding the number one thing is, it is just such a bubble....It is just like the first instinct is to deal with it internally.  
- Athlete Twelve

Athlete respondents were frustrated by internal inquiries, mediation proceedings and formal hearings that they felt failed to protect their interests and which often appeared lacking in impartiality. Two respondents suggested that their hearings were blatantly biased in favour of their coaches. All respondents who did report maltreatment to their organizations were left with unsatisfactory outcomes.

They didn't actually hire a professional mediator. They hired a sports psychologist.... [Organization head] sends me an email and it was like yeah, as you can understand [coach] has been super shaken that you have accused him of sexual harassment and it has shaken him emotionally and physically and mentally and he is only willing to meet with you in person if you respect him and retract everything you have said about him..... I got an email three days later that said... if I wanted to be back on the team I had to [complete] list of requirements... but there were no consequences to his behaviour. - Athlete Nine

Brackenridge says sport's resistance to external regulation lies in the nineteenth-century beginnings of organized sport at which time the current reliance on government funding

and modern impacts on public health interests were not anticipated.<sup>116</sup> Many sport organizations are so steeped in history and traditions that they have a strong aversion to change.<sup>117</sup> Equality reforms and public health protections have become commonplace in business and education,<sup>118</sup> but sport has, for the most part, maintained its independence from outside regulatory systems.<sup>119</sup> Human rights and children's rights legislation have unfortunately had little practical impact on sport regulation.<sup>120</sup>

Self regulation can be particularly problematic when there are serious code of conduct infringements or criminal offences have been committed. One athlete respondent believed that the procedure followed by her sport organization was fundamentally flawed.

I reported it to my [local sport body].... They met as a board and those were in camera meetings.... They kind of asked me what I wanted done in terms of discipline. Which is a pretty hard thing to ask someone like a month after the person you had on a pedestal [is accused of sexual harassment].... They said it was a minor infraction... but it falls under a major infraction. So they actually inappropriately executed their own procedure. - Athlete Eleven

Sometimes potentially criminal complaints were not taken seriously and in many cases little or nothing at all was done.

Even when the red flag came up about the kid sleeping with the coach, nobody cared. There might have been measures in place but nothing was done about it. - Parent Two

The coach was caught playing around with [sexually abusing] his athletes and he was dismissed and [different organization] hired

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<sup>116</sup> Brackenridge, *supra* note 28 at 10.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid* at 24.

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

<sup>120</sup> *Ibid.*

him and [that same organization] had a coach that was dismissed for the same thing [sexual abuse] and [our sport organization] hired him. So they traded.... They had to get rid of them to show the community they were taking care of it, but then he just went 50 miles away and continued doing what he was doing. - Athlete Four

Self regulation is a serious problem when protocol is not followed and there is no automatic review or oversight of decisions made by the sport organization, unless an individual is able and prepared to seek judicial review of a decision. Interview participants were concerned, not so much that protocol did not exist, but more-so that it was not, or would not be, followed. Several participants mentioned the total dismissal or downplaying of incidents that were officially reported to the sport authority.

Right now [the national sport organization] is saying they have a 'zero tolerance' policy for any sort of disobedience, that is not really the right word, but at the same time they are ignoring things that are happening right in front of them. - Athlete Eight

I get an email from [club president] to the team... 'If anyone has a problem we encourage you to step forward.' And then the next day they sent me an email saying [coach] is shaken that you would even accuse them of this. You need to retract what you said if you want to come back to the team.... It was suggested by [head of sport organization] through the lawyer that I shouldn't come forward about problems like this anymore unless they are actually a big deal. - Athlete Nine

One athlete respondent pursued a claim in civil court and found the process was helpful because there was a formal structure that was followed and she finally felt somewhat vindicated.



I really liked going through the civil claim. It was like I was addressing this issue and there were rules. Like there was a rule of order. You couldn't just hijack the whole process... and yeah it felt good. - Athlete Eleven

Receiving payment from the civil settlement in exchange for signing a non-disclosure agreement was less satisfying however.

The money is icky. Even people close to me don't understand that... I still don't know what I am going to do with it, but in a lot of ways, I don't even want it. - Athlete Eleven

This athlete further expressed that she did not anticipate how much mental suffering would result from being unable to talk publicly about what had happened to her. Speaking about one's trauma is medically recognized as contributing to psychological recovery.<sup>121</sup> This athlete is also concerned that because her coach was never publicly reprimanded or disciplined, he continues to coach young female athletes without changing his behaviour.

Lack of external oversight means that organizations can design their own internal policy and hiring processes. Some athlete respondents felt that winning coaches with bad personal reputations are sometimes hired regardless of rumours of previous impropriety. Athlete respondents unanimously agreed that current measures for screening coaches are insufficient.

They don't do background checks on coaches from Europe... [And when they do check Canadian coaches] they strictly look at criminal background. He could be verbally abusing athletes his whole life and he doesn't have a criminal record because no one has been able to come forward about it, but it doesn't mean he is a

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<sup>121</sup> Neville Symington, *A Healing Conversation: How Healing Happens* (London: Karnac, 2006) at 31.

good person to coach kids or coach a development team. - Athlete Eight

I think coaches are screened on their ability to produce athletes, that is it. And coaches who come up through the ranks, like who have been involved in the sport for a long time, for example if [athlete with history of peer-athlete sexual harassment] becomes a coach... all the players would know who he is and his history with going after young female athletes, but that would not be a consideration. - Athlete Twelve

I just found out last year that we do these police checks and my [provincial sport organization] only checks to see that they are complete. They don't check the contents of those checks. - Athlete Eleven

There are different levels of screening that you can do for background checks with the police, but they cost different amounts, so they have opted for the cheaper background checks, but not the most thorough one.... Screening is the first thing to go when the budget is cut. - Athlete Three

Athlete respondents expressed concern that, under the current system of self regulation, some athletes receive more protection from sport authorities than others and favoured athletes are sometimes not reprimanded for inappropriate behaviour. It was suggested that one sport organization might even have shielded an elite athlete from the possibility of criminal prosecution, potentially subjecting the community to further risk by doing so.

He might have been kicked off the team or banned from [training] but nothing apart from that happened and... He was later charged in something else, sex with like a 13 and 14 year old.... He was twenty and she was 13.... I was like wow, I don't think anybody

would be shocked to read that considering his behaviour at [training location] that everyone knew about. - Athlete Twelve

Someone actually got sexually assaulted at the dance and everyone is talking about it, but they are not doing anything.... [Athletes] are at the whim of these sporting organizations, because the coach picks the team. Because the coach and other athletes can have an influence on you getting from where you are to that Olympic dream or whatever your sporting dream would be. You feel cautious and you don't say anything because you don't want it to come back on you and you don't want to jeopardize or risk all those 5am practices. - Athlete Eleven

Maybe if [team manager] instead of saying like, oh, I heard you had a fun night last night, wink wink. Like if she had treated it [sexual assault by older athlete] more like something serious has happened, like let's talk about it. I know 16 or 17 isn't that young, but at the time I felt like a newby on the team.... And the manager can't want to be the best friend of all the national team athletes. It definitely felt like she was a part of them, like on their side. - Athlete Twelve

The lack of an independent authority to handle maltreatment investigations, combined with close personal relationships between coaches, senior athletes and sport executives, and a tendency to protect coaches as employees of the organization, meant that athlete respondents frequently felt that their investigations were farcical and that those responsible for investigating, and making decisions about their complaints, demonstrated blatant conflict of interest.

[Coach] was sleeping with this boy [name] in a hotel by themselves on trips when they are going to [competitions].... We need to amend this [so coaches cannot share hotel rooms with athletes].... It goes to [Executive Director for the province].... He

gives it to one of his staff members.... Isn't that a bit of a conflict of interest? Because he shouldn't have been there at the meeting in the first place and he is a friend of [board chair].... [provincial organization] didn't find anything wrong.... [Went to national sport organization who] said this is not our jurisdiction you need to go to [provincial sport organization] and that was that. - Parent Two

### **5.3.5 Distorted Priorities Within the Sport World**

Athlete maltreatment may be further perpetuated by a sport organization's priorities.<sup>122</sup> In many instances national and provincial sport organizations are dependent on sponsorship, which is dependent on results. This frequently leads organizations, and those in positions of power, to place winning above athlete well-being.

They [sport coaches and administrators] want medals and a bigger team. - Athlete Nine

Goals came first. Results focus means bad behaviour [by coaches] is overlooked. - Athlete Two

The pursuit of athletic goals, medals and sponsorships can become so all consuming that almost no sacrifice seems too great.<sup>123</sup> Many of the athlete respondents say they once subscribed to this way of thinking as did most of those around them.

We were at a time in our careers where we had so much to lose by not performing and again [rewards and sponsorship were] results

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<sup>122</sup> Roberts, *supra* note 41.

<sup>123</sup> Kari Fasting, Celia Brackenridge & Jorunn Sundgot-Borgen. "Experiences of Sexual Harassment and Abuse Among Norwegian Elite Female Athletes and Nonathletes" (2003) 74:1 Research Quarterly Exercise & Sport 83 at 91; Note: Bill Bragg gave legal guardianship of his daughter Holly to her skating coach in order to further her skating career. See Ryan, *supra* note 14 at 171.

based, so you are willing put up with some things.... - Athlete  
Three

Things are at stake. Coaches are being paid six figures and their only job is to produce fast athletes and I think unfortunately right now sport organizations only care about producing faster, winning athletes for whatever sport.... We don't really care if they are also sleeping with fourteen year olds at the same time. - Athlete Twelve

Several athletes expressed the idea that athlete wellbeing needs to become the top sport priority above winning and sponsorship.

Take "Own the Podium", even the name suggests that winning is the most important reason to participate in sport, and that money is the key to medals. The way we motivate and compensate coaches needs to change. Winning shouldn't be the main driver. - Parent Four

Constant underfunding drives many sport organizations to focus on finding, or keeping, sponsors by achieving athletic results. This kind of emphasis on winning is often fear-based. Athlete respondents identified "fear" as a predominant influence when athletes, teammates, parents, bystanders, coaches, staff and sport administrators choose to ignore athlete maltreatment. Organizational administrators may fear damage to their sport's reputation from negative publicity. They may fear personal salary repercussions and the need to make budget cuts if results are not obtained. Coaches may fear negative career outcomes for themselves and their staff.

They want to save their image, their jobs, their names, their reputation and do not put the care of the athletes first and foremost. - Athlete Three

I think it always comes down to money and sponsorships and results, and that we are willing to tolerate things that are not

tolerable because of budget, money and sponsorship - Athlete  
Five

Parents may fear that they will have wasted years of their time, significant financial investment and sometimes they may be living vicariously through their children's athletic successes.

The family must have had the Olympic dream in their eyes and their son was going there and for some reason they thought, and I guess [the coach] convinced them... that he was the only one that could make this happen. So they were furious whenever anyone would stand up and say that this was not appropriate behaviour. [The athlete]'s brother found out what was going on about the masturbation and...I think that is when maybe the mother found out and finally had to do something about it. - Parent Two

Athlete behaviour is often driven by self-interest and they may fear disappointment for themselves, their sponsors, their parents and coaches. Athletes may also fear injury, and the potential for any personal or professional misstep that might lose them status or sponsorship.

I think it [self-interest] is a culture of athletes, they are looking out for themselves and they have to. - Athlete Eleven

A teammate of mine and her mom went to the police to talk about what had happened, and for her it [her experience with the coach] was more verbal abuse. And they got a call from [our senior official at sport organization] that said, 'Think of your daughter's career and it is not going to be good for the sponsors.' So a few days later they withdrew the complaint. - Athlete Three

In Canada, elite athlete funding programs tend to either fund only those athletes deemed most likely to win Olympic medals (by tying funding to results and expectations), or there may be a financial payout for winning Olympic medals. These strategies create

further hierarchy and division among teammates and between sports. They also increase the stakes, putting additional emphasis on the importance of winning, thereby leading sport away from holistic athlete development, which puts athletes at greater risk for maltreatment.<sup>124</sup>

[It's all about] sponsors and money. Elite sports create a culture where shadiness is almost okay.... They want medals. I think they are in a cycle that they can't get out of, where they want medals and then they want to build a bigger team but they don't have the money and OTP [Own the Podium] doesn't really help... I think that creates a lot of hierarchy and separation and it doesn't unify the team.... - Athlete Nine

Perhaps the question should be asked, what price do athletes pay when sports adopt a model driven by financial goals?<sup>125</sup> Research suggests that when stakes are raised, athlete maltreatment tends to increase.<sup>126</sup> Stirling and Kerr believe that a performance outcome focus and a holistic athlete focus are mutually exclusive concepts in sport.<sup>127</sup> The Sport Canada Funding and Accountability Framework Policy Guidelines mandate that Canadian sport programs adopt an athletes first approach,<sup>128</sup> but this has had little practical effect.<sup>129</sup> Advancement of holistic-athlete policy in sport is severely restricted by the widely-held misconception that athlete-centred policy automatically means compromising results.

They need money to run their programs and they need results to get sponsors. It is all linked... you want medals but it's how you

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<sup>124</sup> Kerr, *supra* note 17 at 318; Kerr, *supra* note 19 at 20 and 22.

<sup>125</sup> Kerr, *supra* note 17 at 318.

<sup>126</sup> Kerr, *supra* note 19 at 20.

<sup>127</sup> Kerr, *supra* note 17 at 318.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

go about getting your medals...it's the in-between that needs to change. - Athlete Three

Kerr and Stirling propose that athlete maltreatment issues could be most effectively addressed by educating sport organizations on, and mandating the adoption of, a holistic approach to coaching; one that values development of the whole athlete, rather than focusing on athlete results.<sup>130</sup> In this model, the wellbeing of the athlete would be prioritized over performance outcomes and should also drive all coaching, policy and funding.<sup>131</sup>

Some would argue that the athlete-centred sport model is unobtainable because there is no turning back from sport as a business. As Hoberman says, "You're dealing with a global sports-entertainment industry with a gross turnover of about \$400 billion per year. It's a Goliath that is interested in staying in business."<sup>132</sup> Before athletes and Canadian sport organizations get behind this "business model" however, it would be wise to take stock of the harm that has been caused by a win-at-all-costs mentality in the past; to consider the lessons learned from Russia and China, whose medal-focused governments exposed athletes to forced doping and extreme forms of athlete maltreatment,<sup>133</sup> and most importantly, to stop and listen to the voices of Canadian athletes.

These people [national and provincial sport organizations], that are given the responsibility to protect children, failed us and our parents. It's criminal. No one is willing to admit fault and responsibility, even today. They want to save their image, their jobs, their names, their reputation and do not put the care of the

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<sup>130</sup> Kerr, *supra* note 19 at 22.

<sup>131</sup> Kerr, *supra* note 17 at 316.

<sup>132</sup> John Hoberman, "Physicians and the Sports Doping Epidemic" (2014)16:7 *Virtual Mentor, AMA Journal of Ethics* 570.

<sup>133</sup> "Inside the Soviet Union's Secret 1983 Doping Plan: Start Injecting Athletes, Dominate the Olympics", *National Post* (14 August 2016); Sean Ingle, "China 'Compulsorily Doped' Athletes in 1980s and 90s, Claims Whistleblower", *The Guardian* (22 Oct 2017).



athletes first and foremost. They worry about money and what it is going to cost them. I am so sick of reading and seeing that! -  
Athlete Three

Brackenridge agrees, she calls for stakeholders to work together to shift power away from the commercial engine that has been driving sport, to instead embrace a more athlete-centred mission and perhaps in doing so there could be recognition that the two are not actually opposing forces and that the financial success of sport can in fact be connected to athlete wellbeing.<sup>134</sup>

#### **5.4 Conclusion: Valuing Athletes**

The respondent data discussed in this chapter reveals the persistent power of the commercial engine driving sport, which often pushes athletes to perform at the expense of their mental and physical health. Athlete anecdotes described an international sport culture that continues to be dominated by masculine hegemony, allowing for the perpetuation of widespread discrimination in sport which has serious implications for financial support and athlete vulnerability. There was a clear statement from the athletes that maltreatment is not an individual problem but a systemic issue. Athletes reported on the ongoing sexualization of sport and athletes, and how this promotes eating disorders and creates a pattern of behaviour which can lead to maltreatment of athletes and many forms of lasting harm that extend far beyond the athletes themselves.

The athletes were adamant that insufficient education on sport maltreatment issues further perpetuates the problem by allowing misunderstandings about maltreatment to persist at the athlete, peer, parent, coach, administrator and community levels. Continued sport self-regulation, in spite of calls from athletes and academics to create an independent authority, combined with a marked coach-athlete power imbalance, makes it almost impossible for athletes to find a safe and independent place to report and address

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<sup>134</sup> Celia Brackenridge & Daniel Rhind. "Child Protection in Sport: Reflections on Thirty Years of Science and Activism" (2014) 3 J Social Sciences 326 at 334.

sport maltreatment. Distorted priorities in sport that feed the drive for medals and sponsorship continue to take the emphasis away from athletes and their well being.

The intent of this chapter was to give a direct voice to athletes and to listen to what they say about how sport needs to become more holistic and athlete focused. Athletes simply want a voice. They want to be safe to train to achieve athletic feats, and to celebrate competition and sport, without enduring life-long harm. Says Olympic Wrestling Champion, Erica Weibe,

Let's put the value on people first rather than performance first. I believe if we can shift the culture at the highest level and collaborate across all stakeholders it will have a huge impact on the lives of all Canadians that participate in sport at all levels.<sup>135</sup>

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<sup>135</sup> Kerr, *supra* note 18.

## CHAPTER SIX - RECOMMENDATIONS

### 6.1 Overview

This chapter will offer recommendations that could provide useful insight for academics interested in athlete maltreatment prevention strategies, federal or provincial governments working on sport policy development on maltreatment issues, sport organizations wishing to address maltreatment within their organizations, and athletes, parents and community members who want to understand or push for change in these areas. The recommendations in this chapter will draw upon the information accumulated from the athlete respondent qualitative data discussed in Chapter Five, the academic literature from Chapter Three, and the applicable law and regulation considered in Chapter Two.

Chapter Six will begin with a look at current international and national initiatives to address athlete maltreatment. It will then examine the athlete respondents' personal recommendations on the best way to prevent athlete maltreatment in the future. The chapter will discuss barriers to implementing these changes including: belief systems, resistance to change, flawed approaches, institutional characteristics that increase the likelihood of maltreatment, coach-athlete power imbalance, the perhaps unavoidable financial focus, hands-on coaching perspectives, and inherent athlete vulnerabilities.

Finally, the pros and cons of various solutions that have been proposed for overcoming these barriers will be discussed, such as the enforcement of mandatory child maltreatment reporting legislation and the creation of legislation reflecting child performer protections. I will make legislative suggestions for the enactment of legislation similar to progressive workplace protections, as well as a proposed a change to Canadian criminal law. Any efforts to address athlete maltreatment will need to be supported by an extensive educational mission. Athlete unions and other athlete organizations can provide opportunity for athlete voices to be heard on the issue of athlete maltreatment. Perhaps most importantly, the creation of an independent, national or international, regulatory sport authority may offer athletes the most promising path to lasting change.

## 6.2 Current Initiatives

Some sport organizations have created well-intentioned policies designed to stop athlete maltreatment. For example, the Coaching Association of Canada, Responsible Coaching Movement, has invoked a “Rule of Two”.<sup>1</sup> This measure aims to prevent athlete sexual abuse by requiring that two adults, representing different genders, must be present with an athlete at all times.<sup>2</sup> Policies of this sort are potentially costly because more staff are required, and they can also remove access to sport for athletes living in rural areas or those with parents who are unable to provide transportation.

Furthermore, the success of this policy depends on individuals ethically choosing to follow the rule when no one is looking. The policy tends to put the onus back on the potentially more vulnerable members of the organization, athletes and therapists for example, requiring them to speak up when someone in a position of power over them does not follow the policy. Most significantly, this policy is unlikely to address the most frequently occurring form of maltreatment, which is psychological maltreatment, because psychological maltreatment regularly happens in the presence of coaches, parents and administrators.<sup>3</sup>

Another issue with current athlete maltreatment prevention measures in Canada is the lack of integration with child services agencies.<sup>4</sup> Children’s services often do not get involved with athlete maltreatment cases in Canada because children’s services offices are usually already working at more than full capacity and it is widely believed that sport organizations have effective internal mechanisms to deal with these issues.<sup>5</sup>

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<sup>1</sup> Coaching Association of Canada, *Make Ethical Decisions Module* (2018), online: coach.ca <<http://coach.ca/make-ethical-decisions-med--s16834/Google Scholar>>.

<sup>2</sup> Roslyn Kerr & Gretchen Kerr, “Promoting Athlete Welfare: A Proposal for an International Surveillance System” (2019) 23 Sport Mgmt Rev 96 at 97, online: <<https://doi.org/10.1016/j.smr.2019.05.005>>; Canadian Centre for Child Protection, “Programs and initiatives” (2018), online: <<https://www.protectchildren.ca/en/programs-and-initiatives/Google Scholar>>.

<sup>3</sup> Kerr, *supra* note 2.

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

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

In the United Kingdom and Australia, safe sport initiatives officially come under the umbrella of the national child protection agencies, which are authorized by legislation to take action for the protection of children who may be at risk.<sup>6</sup> Lack of integration with child services, and the insular nature of sport organizations in Canada, significantly limits this kind of cooperation.<sup>7</sup> In addition, many national and provincial sport authorities continue to operate in a manner that is protective and insular, rather than encouraging collaboration with agencies, government, and other stake holders to promote a wholistic safe sport mission.

At the international level, several important educational initiatives have been launched. In 2017, the International Olympic Committee (IOC) created and published safeguarding strategies designed to protect athletes from harassment and maltreatment.<sup>8</sup> They provide instructions to help international federations and national committees implement safeguarding policies and procedures. Rhind et al. created the *International Safeguards for Children in Sport* in 2014.<sup>9</sup> In this manual, a team of international academics call for the development of a global safe sport vision, and cohesive, national and international, maltreatment policy. They recommend prevention measures and offer step by step approaches for effective maltreatment response. They stress the importance of using evidence based initiatives and consistent monitoring and evaluation.<sup>10</sup>

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<sup>6</sup> *Ibid.*

<sup>7</sup> Gretchen Kerr, Ashley Stirling & Ellen MacPherson “A Critical Examination of Child Protection Initiatives in Sport Contexts” (2014) 3:4 Soc Sci 742 at 752.

<sup>8</sup> International Olympic Committee, “Safeguarding Athletes from Harassment and Abuse in Sport: IOC” (3 November 2017), IOC Toolkit for IFs and NOCs, online: <[https://www.iwf.net/wp-content/uploads/downloads/2018/10/IOC\\_Safeguarding\\_Toolkit\\_ENG.pdf](https://www.iwf.net/wp-content/uploads/downloads/2018/10/IOC_Safeguarding_Toolkit_ENG.pdf)>.

<sup>9</sup> Daniel Rhind et al, “Building a System to Safeguard Children in Sport: The Eight CHILDREN Pillars” (2017) 41:2 J Sport & Social Issues 151.

<sup>10</sup> *Ibid.*

There is a recently established International Court of Arbitration for Sport (CAS),<sup>11</sup> and Safe Sport International (SSI)<sup>12</sup> is a new international organization bringing together academics and others dedicated to the safe sport cause. SSI provides safe sport standards, develops safeguarding practices, and is available to assist organizations with safe sport training and delivery. Its inaugural conference was held in 2018.<sup>13</sup> (The second international conference, to be held in Quebec City, was postponed until spring of 2021.)<sup>14</sup>

Perhaps most excitingly, the Centre for Sport and Human Rights (CSHR) was launched in 2018.<sup>15</sup> This international organization, chaired by former President of Ireland, Mary Robinson, has a human rights mission and will aim to curb human rights abuses in sports, provide remedies and help victims.<sup>16</sup> As with all new international safe sport initiatives, the reach of the CSHR, and its ability to address athlete maltreatment on a individual and local level, so far remains unproven, but this organization offers tremendous hope for the future.

### **6.3 Athlete Recommendations**

The causes, impacts and solutions to the problem of athlete maltreatment are varied and complex. Recommendations from athlete respondents and their parents on how to address these issues were strikingly consistent, however. The final interview question put to athlete respondents was, “If we could make one change, what is the best thing that could be done to ensure that athletes receive protection in the future?”. Respondents provided clear statements of support for change in two particular areas.

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<sup>11</sup> Tribunal Arbitral du Sport/Court of Arbitration for Sport, online: [tascas.org <https://www.tascas.org/en/index.html>](https://www.tascas.org/en/index.html).

<sup>12</sup> Safe Sport International, online: <http://www.safesportinternational.com/about/>.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> Human Rights Watch, “New Global Center for Sport and Human Rights” (26 June 2018), online: <https://www.hrw.org/news/2018/06/26/new-global-center-sport-and-human-rights>.

<sup>16</sup> Centre for Sport and Human Rights, online: <https://www.sporhumanrights.org/>.

Eight respondents identified the need to change sport **culture and priorities**. They emphasized the need to make sport more athlete-centred, inclusive and egalitarian.

Changing the person at the top isn't always the answer. What we need is cultural change.... Women were not helping other women in my sport. It is the belief system, not the gender of the leaders that is important. - Athlete One

Not be so results oriented... [Money] is the reason their judgement gets all screwed up and cloudy. They need money to run their programs and they need results to get sponsors. It is all linked... you want medals but it's how you go about getting your medals... it's the in-between that needs to change. - Athlete Three

One of the eight athlete respondents, among those who focused on changing sport culture as their top priority, suggested that old-school strategies, designed to push athletes beyond their comfort zones, are ineffective and damaging and she believes that athlete performance will actually improve, along with athlete mental health, when this kind of maltreatment is eradicated. She suggests that athlete empowerment is an important part of bringing cultural change. She recommends:

Putting the athlete first and trusting them. At this level they are not going to lie to you. When they are making a serious complaint, it is for a reason. - Athlete Nine

These suggestions are consistent with the recommendations by academics writing in parenting, education, and child development fields, many of which have recently endorsed child or youth-centric models that include strategies such as decreasing emphasis on results, prioritizing health and well-being, and bringing youth into decision-

making processes.<sup>17</sup> For the most part, elite sport has not followed suit however, and in many cases sport continues to embrace authoritarian teaching and coaching models, driven by a win-at-all-costs mentality, which compounds the already existing power imbalances in sport.<sup>18</sup>

In addition to the emphasis on end-results and winning, the tendency for sport to be insular and self-regulated<sup>19</sup> means that sport leaders may have little motivation to move toward the child or athlete-centred model, as has been done by many other youth-focused institutions in developed countries.<sup>20</sup> Significant changes of this nature would likely require altering both the culture and structure of sport, and sport coaching, as well as changing the internal belief systems of the organizations that are responsible for sport administration and development.<sup>21</sup>

Five athlete respondents answered the final survey question by emphasizing the need for an **external, professional, independent review system** or body to objectively investigate, hear and adjudicate athlete complaints. A sixth individual did not specifically mention an independent authority, but identified the need for increased awareness,

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<sup>17</sup> Rober Kirkpatrick & Yuebing Zang, “The Negative Influences of Exam-Oriented Education on Chinese High School Students: Backwash from Classroom to Child” (2011) 1:3 *Language Testing in Asia* 36 (2011), online: <<https://doi.org/10.1186/2229-0443-1-3-36>>; Clarie E Ashton-James, Kostadin Kushlev, Elizabeth W Dunn, “Parents Reap What They Sow: Child-Centrism and Parental Well-Being” (2013) 4:6 *Social Psychological and Personality Science* 635.

<sup>18</sup> Christian S Brinton, Brian J Hill & Peter J Ward, “Authoritative Coach: Building Youth Through Sport” (2017) 35:1 *J Park & Rec Admin* 51, online: <<http://ezproxy.library.dal.ca/login?url=https://search-proquest-com.ezproxy.library.dal.ca/docview/2006817230?accountid=10406>>; Gretchen Kerr & Ashley Stirling, “Child Protection in Sport: Implications of an Athlete-Centred Philosophy” (2008) 60:2 *Quest* 307, online: <<https://doi.org/10.1080/00336297.2008.10483583>>; Aaron L Miller, “From Bushidō to Science: A New Pedagogy of Sports Coaching in Japan” (2011) 23:3 *Japan Forum* 385, online:<<https://doi.org/10.1080/09555803.2011.597054>>.

<sup>19</sup> Kerr, *supra* note 7 at 752.

<sup>20</sup> Paulo David, *Human Rights in Youth Sport: A Critical Review of Children’s Rights in Competitive Sports* (London: Routledge, 2005); Peter Donnelly & Gretchen Kerr, “Revising Canada’s Policies on Harassment and Abuse in Sport: A Position Paper and Recommendations” (2018) Centre for Sport Policy Studies, online: <[https://kpe.utoronto.ca/sites/default/files/harassment\\_and\\_abuse\\_in\\_sport\\_csps\\_position\\_paper\\_3.pdf](https://kpe.utoronto.ca/sites/default/files/harassment_and_abuse_in_sport_csps_position_paper_3.pdf)>.

<sup>21</sup> Miller, *supra* note 18.



suggesting that what is required is a system where there is reliable policy enforcement and effective follow up to complaints. That athlete said,

We need to do a better job of policy enforcement and follow up... We have this policy or that policy, but it doesn't matter if no one is enforcing them or even talking about them. - Athlete Seven

One athlete thought that perhaps objective investigations could happen internally:

You just need to have someone in that sport organization who is actually going to be objective and represent the athletes and not the interests of the organization. - Athlete Twelve

Five of the athletes respondents specifically called for an objective independent external review authority. They said:

There is no one who oversees the sports organization so no one has more power than the sports organizations and these organizations have a lot to lose with bad behaviours from their coaches so they are protecting themselves. - Athlete Nine

[We need] a council [independent body] where we can report to instead of reporting to one person who is this alumni of the team who does [unrelated field of work] and is in way over his head and doesn't know what to do with a sexual harassment claim. - Athlete Nine

These views are consistent with the collective statement produced by athletes attending an AthletesCAN Safe Sport conference, in 2019. They said:

We're asking for an external entity that is removed from the people in power that have allowed this to continue for so long. We're asking for a shift in the cultural landscape of sport in Canada. We're owning the podium, but we can do that AND still

be safe and ethical. Let's put the value on people first rather than performance first. I believe if we can shift the culture at the highest level and collaborate across all stakeholders, it will have a huge impact on the lives of all Canadians that participate in sport at all levels.<sup>22</sup>

One of the athlete parents stated that she believes the most important change, for the future safety of athletes, would be to end psychological maltreatment of athletes. She indicated that a significant number of untracked athletes leave elite sport every year because of psychological maltreatment and many of them suffer lasting emotional trauma. Her recommendation is:

Ensure that coaches have to be positive and inspiring. There is so little positivity it is shocking.... There has to be education.... The new way of getting excellence is through a more well-rounded coach. The mental and emotional side of it is huge. - Parent Two

The research supports this move toward a focus on athlete health rather than performance, but coaches, sponsors and sport organizations are often loathe to embrace these new methods.<sup>23</sup> Many coaches continue to draw upon their personal sport experiences<sup>24</sup> and some stubbornly hold onto the idea that building mental toughness and team cohesiveness, through shared struggle, is the key to creating champions.<sup>25</sup>

Science has increasingly proven however that proper rest, nutrition, and evidence supported motivational training strategies, will better contribute to building strong bodies

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<sup>22</sup> Gretchen Kerr, Erin Wilson & Ashley Stirling, in partnership with AthletesCan, "Prevalence of Maltreatment Among Current and Former National Team Athletes", (30 April 2019), online: <[https://athletescan.com/sites/default/files/images/prevalence\\_of\\_maltreatment\\_reporteng.pdf](https://athletescan.com/sites/default/files/images/prevalence_of_maltreatment_reporteng.pdf)> ; AthletesCan, "More Than 1000 Top Canadian Athletes Inform Prevalence Study Of Maltreatment In Sport" (7 May 2019), online: <<https://athletescan.com/en/more-1000-top-canadian-athletes-inform-prevalence-study-maltreatment-sport>>.

<sup>23</sup> Miller, *supra* note 18 at 392.

<sup>24</sup> *Ibid* at 395.

<sup>25</sup> *Ibid* at 397.

and minds that will be capable of the kind of confident, independent thinking that can consistently succeed in sporting events.<sup>26</sup> Until outdated thinking is changed however, there will continue to be resistance to a more holistic training approach, and athletes will continue to suffer psychological and physical harms, and in some cases even death, resulting from constantly increasing pressure to succeed.<sup>27</sup>

## **6.4 The Downfall of Safe Sport Measures**

### **6.4.1 Sport Culture and Tradition**

One of the biggest obstacles preventing sport organizations from embracing this proposed change, the move from a focus on athletic results to a genuine focus on athlete wellbeing, is that doing so goes against sport history, tradition and long-held institutional beliefs.<sup>28</sup> From its earliest days, sport has been considered a positive form of recreation that would be negatively influenced by any form of regulation, and sport has consequently operated free from most government or community interference.<sup>29</sup>

### **6.4.2 The Need for Disruptive Innovation**

This insular protectionist thinking has prevented philosophical shifts from happening in sport,<sup>30</sup> but in the business world, the capitalist free-market periodically forces acceptance of radical innovation.<sup>31</sup> Christensen introduced the theory of “disruptive innovation” some twenty years ago.<sup>32</sup> He described how new industry leaders often emerge when established businesses stubbornly stick to their old ways in the face of

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<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid* at 388.

<sup>28</sup> Simon Gardiner, et al, *Sports Law*, 4th ed (London: Routledge, 2012) at 93.

<sup>29</sup> *Ibid* at 77 & 89; J Black, *Rules and Regulators* (Oxford: Clarendon, 1997) at 103 & 219; Kerr, *supra* note 7 at 751.

<sup>30</sup> Gardiner, *supra* note 28 at 74.

<sup>31</sup> Clayton M Christensen, *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail* (Boston: Harvard Business Review Press, 1997) at 17.

<sup>32</sup> *Ibid.*

revolutionary ideas and a changing world.<sup>33</sup> Henderson wrote that “architectural innovation” is required to thrive in this environment, but she says this requires a willingness to embrace profound change. Since the changes will not fit within the existing organizational structure, the organization must essentially be prepared to recreate itself.<sup>34</sup>

Because architectural innovation potentially threatens the existing structure and power of the organization, this naturally creates resistance.<sup>35</sup> Architectural innovation also requires financial commitment and considerable human effort, therefore it may often seem easier to stick to old ways.<sup>36</sup> The resistance may include internal denial as well as questions as to profitability. In the business world however, companies unwilling to innovate frequently end up losing their status as industry leaders, as happened with Blockbuster, IBM, and Sears.<sup>37</sup>

Innovation in sport is now clearly on the horizon.<sup>38</sup> Athletes are organizing and taking initiative.<sup>39</sup> They are demanding a voice in the decisions that affect them. Some want the opportunity for financial remuneration, or an end to professional and amateur athletic distinctions.<sup>40</sup> There is debate over traditional categorizations for competition and questions about the impact these have on non-binary, transgender, or athletes with “non-traditional” hormone levels.<sup>41</sup>

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<sup>33</sup> *Ibid.*

<sup>34</sup> Rebecca M Henderson & Kim B Clark, “Architectural Innovation: The Reconfiguration of Existing Product Technologies and the Failure of Established Firms” (1990) 35:1 *Admin Sci Quarterly*, Special Issue: Technology, Organizations, and Innovation 9 at 13.

<sup>35</sup> *Ibid* at 28.

<sup>36</sup> *Ibid* at 16.

<sup>37</sup> Christensen, *supra* note 31 at 15-17; Henderson, *supra* note 34 at 10.

<sup>38</sup> *supra* note 18.

<sup>39</sup> Doug Harrison, “New Athlete-Led Movement Aims to Drive Change Across the Sporting World” *CBC Sports* (13 Feb 2019).

<sup>40</sup> Jolene Rudisuela, “Elite Athletes Struggle for Financial Support” *Calgary Herald* (5 July 2016).

<sup>41</sup> Shane Aaron Miller, “Just Look at her!”: Sporting Bodies as Athletic Resistance and the Limits of Sport Norms in the Case of Caster Semenya” (2014) 18:3 *Men and Masculinities* at 294.

It is a new era for sport, and if sport leaders, like the International Olympic Committee (IOC), and the national sport federations, wish to move forward and hold onto their existing power and authority, they will need to embrace radical industry change and innovation in a way that challenges traditional thinking. They will need to keep the pace by introducing new wholistic approaches to training, coaching, competing, regulating, categorizing and supervising athletes, at all levels of competition and across every sport.

The results of the policies, programs, training and strategies for preventing, addressing and remedying maltreatment of athletes in Canada have, so far, been disappointing. Athlete respondents and their parents shared their despair regarding how little progress has been made, in spite of many years of expensive screening, regulation, educational initiatives and government investment. Why have Canadian safe sport inroads been so slow and ineffective? The next section will examine some of the errors that have been made and the obstacles to effective maltreatment prevention.

#### **6.4.3 Problems With Current Safe Sport Systems**

After more than twenty years of work on athlete maltreatment issues, sport organizations should have developed effective protocols for prevention, investigation and remedy, but current systems continue to fail athletes. Perrow theorized on why systemic failures happen in the technology sector.<sup>42</sup> He says that when back up systems are known to be in place, those in the organization may so completely trust in the efficacy of the back up system that they never consider what happens if the back up system fails.<sup>43</sup> Perrow also adds that if an enterprise is primarily driven by profits, individuals may be so focused on

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<sup>42</sup> Charles Perrow, *Normal Accidents : Living with High Risk Technologies* Updated Ed, (Princeton New Jersey: Princeton University Press, 1999) at 3.

<sup>43</sup> *Ibid* at 4.

end goals that they do not stop to examine whether the organization or system as a whole is thriving.<sup>44</sup>

Similarly, it appears that in the last twenty years, sport has relied on its go-to systems for preventing athlete maltreatment: education, policy and screening measures. Unlike the technology sector, there are no backup systems in sport, and because sport organizations are self-regulating, there are no external checks on their systems. Most sport professionals are so focused on achieving results, and maintaining sponsorships, that they rarely stop to consider whether the athletes, and the sport itself, is actually thriving.

Perrow warns that human mishaps should be expected in all circumstances and recommends establishing simple systems that will be engaged when mistakes happen.<sup>45</sup> When disaster strikes, fault usually lies, not with an individual, but with an overly complicated system.<sup>46</sup> To reduce human error it is essential to have systems that reduce the need for human decision making, thereby assuring that one human failure does not lead to others.<sup>47</sup> Safe sport failures often fit Perrow's model. They rely on internal systems that are imprecise and overly dependent on human decision-making. Organizational emphasis is usually on money and athletic results, and those within the system are often so focused on immediate goals that they may not be able to see the big picture.

For example, Athlete Nine reported maltreatment by her coach. She used the proper channels established by her sport federation. The process that was subsequently followed, loosely followed the organization's regulations, but was ad hoc, biased in favour of the

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<sup>44</sup> *Ibid* at 14; Ken Eisold, "All Errors Are Human Errors: We Cannot Hope to Avoid Accidents" *Psychology Today* (28 Jan 2011), online: <<https://www.psychologytoday.com/za/blog/hidden-motives/201101/all-errors-are-human-errors>>.

<sup>45</sup> Perrow, *supra* note 42 at 354.

<sup>46</sup> *Ibid*.

<sup>47</sup> *Ibid*; Tim Harford, "What We Can Learn From a Nuclear Reactor" *Financial Times* (14 January 2011), online: <<https://www.ft.com/content/cea7b256-1def-11e0-badd-00144feab49a>>.

coach, did not engage independent professional decision makers, and was unresponsive to the athlete's concerns.

There was no available back up system, unless she was prepared to formally appeal the organization's decision in court. This would have required hiring a lawyer, would have taken a great deal of time and personal energy, and win or lose, the process would have further alienated the athlete from her sport. She felt she had to toe the line or quit her team, so she left.

Athlete Eleven also reported coach maltreatment using the procedures laid out in her sport's code of conduct. Her sport organization decided the infraction was minor in nature, thereby misinterpreting the nature of the offence. They held an internal informal hearing, and inappropriately, asked the already emotionally distraught athlete to suggest a suitable punishment for her coach. The athlete left her club. She eventually proceeded with a claim using the civil system.

By the time the civil settlement concluded, it was years after the complaint was first addressed. The athlete was required to sign a non-disclosure agreement, which added to her personal suffering, as she was thereby restrained from talking about what she had gone through. She got surprisingly little emotional satisfaction from the financial payout she received, and worst of all, she watched helplessly as her former coach continued to coach other young girls without remotely altering his behaviour.

As Perrow explains, the blame for unsuccessful outcomes does not wholly lie with the individuals who misinterpreted regulations, acted with bias, or engaged in faulty processes.<sup>48</sup> Complicated regulations, costly procedures, institutional goals that conflict with the pursuit of a fair outcome, and lack of skilled, trained professionals to oversee the processes, will inevitably increase the risk of human error, faulty decision-making and

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<sup>48</sup> *Ibid.*

poor outcomes. The absence of an independent, objective and reliable back-up system for athletes to turn to if the internal process fails, only compounds the problem.<sup>49</sup>

Effective reorganization is key for any successful innovation and this requires someone taking ownership of the mission.<sup>50</sup> The new project, in this case the implementation of safe sport policy and regulations, cannot be tacked onto an existing department, or added to an already busy person's job. It must be assigned to an individual who will own the project and make sure that the innovation works.

British military missed out on an innovative war strategy, in the early part of the twentieth century, because senior military officials refused to embrace the idea of using tanks. Years later, when tanks were reluctantly accepted by the military, they were assigned to the cavalry, which had a resistance to tanks resulting from their natural bias toward horses.<sup>51</sup> Similarly, policy and systems to address athlete maltreatment are not always welcomed by sport organizations. When these innovations are tacked onto the job of a sport executive, who may have a pre-existing bias, lack of prerequisite skills, and whose other responsibilities may even conflict with his or her ability to respond effectively to a maltreatment complaint, outcomes are likely to suffer.

#### **6.4.4 Why Individual Approaches to Athlete Protections Fail**

Canadian sport organizations have been working on safe sport strategies ever since Sheldon Kennedy's status as a respected, professional, male athlete brought sudden

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<sup>49</sup> Dispute resolution is available through the Sport Dispute Resolution Centre of Canada (SDRCC), a national, sport-specific alternative dispute resolution organization geared toward resolving conflicts that arise within the Canadian amateur sport community. This process requires entering into binding mediation however, and none of the athlete respondents involved in complaints felt that this process was likely to benefit them.

<sup>50</sup> Henderson, *supra* note 34; Tim Harford, "Why Big Companies Squander Good Ideas: The FT's Undercover Economist on the Real Reasons That Corporate Innovation Dies" *Financial Times* (6 Sept 2018), online: < <https://www.ft.com/content/3c1ab748-b09b-11e8-8d14-6f049d06439c>>.

<sup>51</sup> Harford, *supra* note 47.



international awareness to the issue of athlete sexual abuse in 1997.<sup>52</sup> Early policies and programs were designed with the primary aim of keeping “child molesters” out of sport.<sup>53</sup> This approach led to wide-spread screening and police checks on individuals applying to work with children in sport.<sup>54</sup> Sport organizations then started focusing on finding the “right people” for their coaching jobs and volunteer positions, rather than examining internal problems inherent in the system itself.<sup>55</sup> (This individual approach to making sport safer has been unsuccessful for reasons explained in detail in Chapters Three and Five.)

Consistent with Perrow’s theory that errors usually result from systemic failures, rather than individual mistakes, Brackenridge says safe sport solutions that focus on individuals are doomed. She suggests that effective systems can prevent maltreatment of athletes, but only if they are ethical, responsive and transparent.<sup>56</sup> The first step requires looking inward and examining sport culture, governance, leadership, accountability, and belief systems.<sup>57</sup>

#### **6.4.5 Belief Systems**

Sport belief systems are a bit like the British cavalry officers, they may not welcome new ideas. One persistent, traditional coaching belief is that athletes need to be pushed beyond what they think they are capable of. In order to do this many coaches believe that it is their job to yell, insult and demand performance from exhausted or injured athletes. In

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<sup>52</sup> M Bradford Preston, “Sheldon Kennedy and a Canadian Tragedy Revisited: A Comparative Look at U.S. and Canadian Jurisprudence on Youth Sports Organizations’ Civil Liability for Child Sexual Exploitation” (2006) 39:4 Vanderbilt J Transnational Law 1333.

<sup>53</sup> Michael Gibbons & Dana Campbell, “Liability of Recreation and Competitive Sport Organizations for Sexual Assaults on Children by Administrators, Coaches and Volunteers” (2003) 13:3 J of Leg Aspects of Sport at 185.

<sup>54</sup> *Ibid* at 186-187.

<sup>55</sup> Celia Brackenridge & Daniel Rhind, “Child Protection in Sport: Reflections on Thirty Years of Science and Activism” (2014) 3 J Social Sciences 326 at 333.

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

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

describing her mission as an international figure skating coach, Evy Scotvold said, “No human being can drive himself to his zenith, to his finest point.”<sup>58</sup>

Athlete respondents suggest that many coaches continue to embrace this scientifically outdated approach to athlete motivation. Famous coaching quotations such as, “Winning isn’t everything; it’s the only thing,”<sup>59</sup> still persist in regular sport usage today, even though such philosophies date back to the 1950s, when racism, sexism, homophobia, and corporal punishment were all part of the fabric of society. Cultural norms in families, schools, workplace, and institutions have dramatically altered since the 1950s, however the world of elite sport remains remarkably unchanged.<sup>60</sup>

Efforts to abandon the “champions get up when they can’t”,<sup>61</sup> approach to athletic coaching, loosely parallel the international struggle to abolish corporal punishment of children. Proponents of corporal punishment continue to insist that physical punishment is an effective way of disciplining children in spite of convincing evidence to the contrary.<sup>62</sup> Both Canada and the United States continue to resist pressure from the United Nations to legally ban private corporal punishment of children,<sup>63</sup> although in many cases they have done so at an institutional level. There continues to be misunderstanding about what kinds of punishment are appropriate, in spite of a growing movement to recognize

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<sup>58</sup> Joan Ryan, *Little Girls in Pretty Boxes: The Making and Breaking of Elite Gymnasts and Figure Skaters* (New York: Warner Books, 1996) at 220.

<sup>59</sup> Fred Pettijohn, *Tallahassee Democrat*, Tallahassee, Florida (7 February 1950).

<sup>60</sup> Miller, *supra* note 18 at 294.

<sup>61</sup> Quote attributed to Jack Dempsey, world heavy weight champion boxer from 1919-1926. See Randy Roberts, *Jack Dempsey: The Manassa Mauler* (Baton Rouge: Louisiana State University Press, 1979).

<sup>62</sup> Valerie Michaelson, “Canada: What Will It Take to End Physical Punishment of Children”, *The Canadian Press*, (22 Nov 2018), online: <<https://nationalpost.com/pmnl/news-pmn/canada-what-will-it-take-to-end-physical-punishment-of-children>>; Frank J Elgar, et al, “Corporal Punishment Bans and Physical Fighting in Adolescents: An Ecological Study of 88 Countries” (2018) 8:9 *BMJ Open*, online: <[doi:10.1136/bmjopen-2018-021616](https://doi.org/10.1136/bmjopen-2018-021616)>.

<sup>63</sup> *Ibid.* Note: 54 countries have banned corporal punishment with 56 more committed to passing such legislation in the near future. Canada has been openly criticized by the United Nations Committee on the Rights of the Child. In 2003 the committee recommended that Canada create legislation to protect vulnerable children but also that corporal punishment should be made illegal in Canada.

exercise, used as discipline, as a form of corporal punishment.<sup>64</sup> Lack of education and understanding about the potential harms physical punishment can have serious implications for athletes.

Academics report that physical punishment "...places children at risk for poor mental health, higher levels of violence and aggression, low emotional-adjustment and increased antisocial behaviour."<sup>65</sup> In spite of overwhelming evidence about the harms of corporal punishment, Canada continues to be constrained by commitment to traditions, as well as cultural and religious practices.<sup>66</sup> The continued ideological endorsement of corporal punishment in Canada and the United States has also been felt in the sport world.

Bella Karolyi is famous for his unprecedented success in international gymnastics coaching, but is also notorious for his extreme methods. Karolyi's persistent public maltreatment of athletes produced so many gold medals that many coaches copied his style as well as his rigorous training schedule - two workouts each day, six days a week, while demanding complete obedience.<sup>67</sup> Evidence that the Karolyi style of yelling, bullying and over-working athletes causes long term physical and mental harm is scientifically irrefutable<sup>68</sup> yet, like those who continue to support corporal punishment, if the practice is an accepted part of sport tradition and history, and the desired end result is

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<sup>64</sup> Ron Ensom & Joan Durrant, "Physical Punishment of Children in Sport and Recreation: The Times They Are A-Changin'" (2010) 17:2 *Coaches Plan* at 43, online: <[http://js-advocacy.ca/pdf/PP\\_in\\_Sport\\_and\\_Recreation-II\\_Eng.pdf](http://js-advocacy.ca/pdf/PP_in_Sport_and_Recreation-II_Eng.pdf).:>; Mark Anshel, "Exercise Should Never Be Used as Punishment" *Tennessean* (18 Aug 2014) online:<<https://www.tennessean.com/story/opinion/2014/08/18/exercise-never-used-punishment/14189291/>>; Richard Parker, "Right or Wrong, Corporal Punishment Can Produce Winners" *Japan Times* (12 March 2014).

<sup>65</sup> Michaelson, *supra* note 62.

<sup>66</sup> *Ibid.*

<sup>67</sup> Ryan, *supra* note 58 at 216.

<sup>68</sup> *Supra* note 2.

even superficially achieved, many individuals will continue to ignore the potential for harm and cling to the belief that the method has proven to be successful.<sup>69</sup>

Rick Newman, one of the many Karolyi imitators, said he did not understand at the time that his Karolyi-like methods could cause psychological harm.<sup>70</sup> He thought it was his job to push his athletes and to leave no stone unturned.<sup>71</sup> Newman also tried to distance himself from any blame by stressing that athletes participated in his program **willingly**.<sup>72</sup> As discussed at numerous points in this thesis, elite athletes may be so invested, and so focused on their end goals, that they may be unable to make responsible decisions even when those decisions might be for their own safety and protection. Child athletes may be further limited by a lack of understanding of their rights and pressures from a parent or guardian.

He had me convinced that this was part of the job, which I know sounds so crazy now. This [sexual relationship] was part of the program to be an athlete of his. - Athlete Seven

I think back, and I put up with so much, thinking this is what I needed to do to achieve, but it was super unhealthy. - Athlete Three

Many leaders of sport organizations do recognize that maltreatment of athletes can be a problem in sport, and since the Sheldon Kennedy case, most will acknowledge that athlete sexual abuse occasionally happens, but many coaches and leaders of sport organizations do not accept that these are potential issues with their coaching staff

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<sup>69</sup> Note: There are signs that this is beginning change. Maggie Haney, elite American gymnastics coach was recently suspended for eight years for her maltreatment of athletes in the form of verbal abuse and pushing athletes to continue to train while injured. Danielle Allentuck, “Maggie Haney, Elite Gymnastics Coach, is Suspended for 8 Years” *New York Times* (29 April 2020), online: <<https://www.nytimes.com/2020/04/29/sports/gymnastics-coach-banned-maggie-haney.html>>.

<sup>70</sup> Ryan, *supra* note 58 at 216.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid* at 218.

and within their own organizations.<sup>73</sup> Changing this thinking will be essential because maltreatment prevention policies and strategies cannot be successful if those in charge do not believe that athlete maltreatment is a potential problem at their organization.

#### **6.4.6 Institutional Characteristics That Perpetuate Sport Maltreatment**

In order to convince organizations that maltreatment in their sport, and in every sport, is a possibility, it is first necessary to understand how and why maltreatment happens and what internal and external factors may be influencing the likelihood of its occurrence. Research has shown that the types of maltreatment that tend to be most frequently associated with trust relationships and power imbalances (both of which are common in sport) are psychological maltreatment and sexual abuse.<sup>74</sup>

Psychological and physical maltreatment are both significantly impacted by belief systems that normalize and legitimize these forms of abuse.<sup>75</sup> Physical abuse may also be tied to a win-at-all-costs mentality and athlete isolation tends to be associated with sexual abuse.<sup>76</sup> Many of these features, such as a win-at-all-costs mentality and organizational belief system, are capable of being strategically altered through education, policy and a conscious commitment to new priorities and objectives, while others, like physical isolation associated with training and travel for competition, can be more difficult and sometimes costly to address. Coach-athlete trust relationships and coach-athlete power imbalance will likely always exist.<sup>77</sup>

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<sup>73</sup> Sylvie Parent & Karim El Hlimi, "Athlete Protection in Quebec's Sport System: Assessments, Problems, and Challenges" (2012) 37 J Sport & Social Issues 284; Sylvie Parent & Guylaine Demers, "Sexual Abuse in Sport: A Model to Prevent and Protect Athletes" (2011) 20 Child Abuse Rev 120 at 125-126; Sylvie Parent, "Disclosure of Sexual Abuse in Sport Organizations: A Case Study" (2011) 20:3 J Child Sexual Abuse 322 at 328.

<sup>74</sup> Victoria Roberts, Victor Sojo & Felix Grant, "Organizational Factors and Non-Accidental Violence in Sport: A Systematic Review" (2019) Sport Management Review, online: <<https://www.sciencedirect.com/science/article/abs/pii/S1441352318304455>> at 2.

<sup>75</sup> *Ibid* at 9.

<sup>76</sup> *Ibid* at 8 & 28.

<sup>77</sup> *Ibid* at 38.

The financial demands of competing in elite sport can shorten athletic careers and may also impact mental health and the ability of an athlete to resist maltreatment. One athlete respondent expressed concern that his parents' divorce, and their financial stresses, were exacerbated by the exceedingly high financial costs associated with his lengthy international athletic career.

The cost of competing rises steadily with athletic success and many athletes do not have the private financial means necessary to sustain their athletic pursuits. Elite athletes in Canada have a reported average monthly shortage of more than \$1200 per month, or \$15,000 per year,<sup>78</sup> with most athletes officially living well below the poverty line.<sup>79</sup> Reliance on sponsorships and outside funding sources can significantly increase stress and athlete vulnerability. Convicted coach, Graham James, intentionally targeted young hockey players, like Theo Fleury and Sheldon Kennedy, whose families could not afford to cover their training and travel costs.<sup>80</sup>

In addition to financial demands, trust relationships, power imbalance, travel, and isolation, certain other organizational characteristics have been shown to increase the likelihood of institutional sexual abuse.<sup>81</sup> (Institutional sexual abuse research is relied upon here because it has been more widely studied than athlete maltreatment and the organizational characteristics that are identified are likely to be relevant for some, if not all, of the forms of athlete maltreatment.) Mathews says these institutional characteristics include the: belief system, culture, structure, rules and size of an organization, as well as organizational issues such as funding shortages, insufficient professional expertise, and frequent professional turnover.<sup>82</sup>

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<sup>78</sup> Rudisuela, *supra*, note 40.

<sup>79</sup> *Ibid.*

<sup>80</sup> Sheldon Kennedy, with James Grainger, *Why I Didn't Say Anything* (London, Ontario: Insomniac, 2011) at 114.

<sup>81</sup> Roberts, *supra* note 74 at 27-29.

<sup>82</sup> Ben Mathews, *New International Frontiers in Child Sexual Abuse: Theory, Problem and Progress* (Cham, Switzerland: Springer, 2019)163.

Some organizations may inadvertently perpetuate maltreatment because of ignorance or incompetence, while others understand the implications of what they are doing, and choose to consciously engage in complicit behaviour.<sup>83</sup> Smith and Freyd list the following characteristics as being likely to increase maltreatment in youth organizations, and in particular to create opportunity for sexual abuse:

1. restricted organizational membership, and a high value associated with that membership
2. prestige associated with the institution
3. a high institutional value placed on prestige and public image
4. a hierarchical system and no safe place for reporting
5. power imbalances between members
6. trust relationships between members
7. a high personal value associated with remaining in the organization
8. a high personal value associated with remaining in a relationship with the potential offender
9. fear of implications and consequences for the organization from reports of inappropriate behaviour
10. insufficient strategy: policy, education, screening, reporting, transparency, training, and punishment of victims or whistle blowers.<sup>84</sup>

Additional characteristics were added to this list by Wurtele. These include:

11. a sexualized organizational environment
12. lack of transparency
13. centralized system of power

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<sup>83</sup> Kenneth V Lanning & Park Dietz, "Acquaintance Molestation and Youth-Serving Organizations" (2014) 29:15 J of Interpersonal Violence at 2820.

<sup>84</sup> Carly Parnitzke Smith & Jennifer J Freyd, "Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma" (2013) 26:1 J of Traumatic Stress at 120.

#### 14. lack of zero tolerance for breaches of policy<sup>85</sup>

Finkelhor theorizes that institutional sexual abuse of children requires that the perpetrator overcome three things: personal inhibitions that might prevent them from carrying out the offence, external social or organizational constraints, and victim resistance.<sup>86</sup> Similarly, these preconditions must exist for other forms of maltreatment to occur. The Smith and the Wurtele studies produced a list of organizational factors which have been shown to increase the likelihood of sexual abuse in child and youth serving institutions.<sup>87</sup> It is notable that elite sport organizations frequently possess **every one** of the listed risk factors.

Once identified, some of these factors can be reduced through education, encouraging reporting and protecting whistle blowers, strong professional leadership, prompt dealing with complaints, transparent decision-making, placing the goal of maltreatment resolution above organizational reputation, and allowing for external independent oversight.<sup>88</sup> It may also be beneficial to increase female and visible minority representation on boards and in organizational executive positions. Factors, like coach-athlete trust relationships, or the value of being associated with an elite sport organization, will always exist. Being aware of these risk factors and acknowledging that they may increase the risk of athlete maltreatment within elite sport organizations, is an important starting point.

#### **6.4.7 Tangible and Intangible Factors That May Affect Athlete Maltreatment**

Tangible influences that may increase or decrease the likelihood of athlete maltreatment may include: the geographical location and physical structure and layout of the building, and whether athletes are ever alone with adults in rooms without

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<sup>85</sup> Sandy K Wurtele, “Preventing the Sexual Exploitation of Minors in Youth-Serving Organizations” (2012) 34:12 Children & Youth Services Rev at 2445.

<sup>86</sup> David Finkelhor, *Child Sexual Abuse: New Theory and Research* (New York: Free Press, 1984) at 56.

<sup>87</sup> Parnitzke Smith, *supra* note 84; Wurtele, *supra* note 85.

<sup>88</sup> *Ibid.*



windows, or behind closed doors, in areas with no cameras, or in isolated bathrooms or changing rooms.<sup>89</sup> Concrete matters such as these are relatively easy to address by changing standard behaviour patterns, choosing training locations that are easily accessible, installing cameras in potentially dark or unsupervised areas, and establishing and publicizing rules requiring that athletes may not be alone with adult coaches or other authority figures. Unfortunately, some measures such as always bringing a chaperone when travelling to competitions, or coaches not sharing hotel rooms with athletes, can impose a considerable financial burden.

Intangible influences are more difficult to manage. These might include the amount of control that a coach has over an athlete, which may be impacted by the power of the coach to control athletic destiny, as well as the life circumstances and personal characteristics of the athlete.<sup>90</sup> Athlete maltreatment tends to happen more frequently when there is excessive focus on results,<sup>91</sup> and a historical sport culture and belief system wherein those involved may not recognize the harm the maltreatment is causing.<sup>92</sup>

The intimacy of the coach-athlete relationship may be enhanced by factors such as how much time they spend together, the amount and type of support provided by the coach, the athlete's personality and personal needs, and what kind of relationship the athlete has with parents and peers.<sup>93</sup> Significant wins and losses may also deepen intimacy in the athlete-coach relationship,<sup>94</sup> but athlete-coach closeness is only

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<sup>89</sup> Mathews, *supra* note 82.

<sup>90</sup> Mathews, *supra* note 82 at 163; Celia Brackenridge, *Spoilsports: Understanding and Preventing Sexual Exploitation in Sport* (London: Routledge, 2001) at 99.

<sup>91</sup> Robert Hughes & Jay Coakley, "Positive Deviance among Athletes: The Implications of Over Conformity to the Sports Ethic", (1991) 8:4 *Sociology of Sport Journal*, at 307.

<sup>92</sup> Jenny McMahon & Chris Zehntner, "Shifting Perspectives: Transitioning from Coach Centred to Athlete Centred - Challenges Faced By a Coach and Athlete", 1:2 *J Athlete Centred Coaching* at 1.

<sup>93</sup> *Ibid.*

<sup>94</sup> Mathews, *supra* note 82.

problematic if the coach does not maintain a constant professional relationship with the athlete.

#### 6.4.8 Professional Touching

In some sports, coaches regularly touch athletes to provide assistance, for spotting or for instruction purposes. This is frequently considered an essential part of training.<sup>95</sup> Coaches massaging an injured athlete may also be considered normal and acceptable behaviour.<sup>96</sup> Many coaches and sport administrators who are resistant to letting go of these practices suggest that quality of coaching is diminished by over-regulation.<sup>97</sup> Some academics have taken the position that it is not the touching itself, but the motives behind the touching and the context for the touching that matter.<sup>98</sup> Australia's Play by the Rules organization suggests it is important to allow for flexibility through the creation of specific rules designed to be appropriate for each particular sport.<sup>99</sup>

Many coaches feel that their close personal relationships with athletes are an essential part of coaching.<sup>100</sup> In some cases that relationship may include giving personal advice, providing support and developing a certain level of intimacy.<sup>101</sup> Some coaches and sport administrators say their relationships with athletes, and the ability to do

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<sup>95</sup> *Ibid* at 163.

<sup>96</sup> *Ibid*.

<sup>97</sup> Heather Piper, Bill Taylor & Dean Garratt, "Sports Coaching in Risk Society: No Touch! No Trust!" (2012) 17 *Sport, Education and Society* 331.

<sup>98</sup> Dean Garratt, Heather Piper & Bill Taylor, "'Safeguarding' Sports Coaching: Foucault, Genealogy and Critique" (2013) 18:5 *Sport, Ed & Society* at 615; Robyn L Jones, Jake Bailey & Sofia Santos, "Coaching, Caring and the Politics of Trust: A Visual Exploration", in Heather Piper, Dean Garratt & Bill Taylor, eds, *Moral Panic in Physical Education and Coaching* (Abingdon, Oxon: Routledge 2015).

<sup>99</sup> "Physical Contact with Children", Play By The Rules website, online: [playbytherules.net](http://playbytherules.net) <<https://www.playbytherules.net.au/got-an-issue/physical-contact-with-children>>.

<sup>100</sup> Joannie Pépin-Gagné & Sylvie Parent, "Coaching, Touching, and False Allegations of Sexual Abuse in Canada" (2016) 40:2 *J Sport & Social Issues* at 163.

<sup>101</sup> JD Bringer, CH Brackenridge, & LH Johnston, "Swimming Coaches' Perceptions of Sexual Exploitation in Sport: A Preliminary Model of Role Conflict and Role Ambiguity" (2006) 20 *Sport Psychologist* 465; Pépin-Gagné, *supra* note 100 at 163.

their jobs, are being negatively impacted by the fear of being falsely accused of athlete maltreatment.<sup>102</sup>

This unsubstantiated fear, of misinterpreted coach-athlete touching incidents, or intentionally malicious false reporting, may be adding to the further victimization of athletes if it leads organizations to avoid creating boundaries and establishing and enforcing protective policy. Athletes who do experience maltreatment may be even less inclined to come forward in these situations because there is a recognized organizational resistance to the legitimacy of athlete complaints.<sup>103</sup>

Proponents of less regulation say that restrictions often go too far and that forbidding coaches from touching athletes is unreasonable in that it limits the coach's ability to do their job safely and responsibly.<sup>104</sup> It has been claimed that many coaches are suffering from stress resulting from excessive regulation and concerns about being wrongly accused of impropriety.<sup>105</sup> This should not be allowed to overshadow or derail the goal of the safe sport mission, which is the protection of athletes.

Proposed restrictions on athletic touching have been modelled on successful regulation in educational institutions and the health professions.<sup>106</sup> It is now common practice for health professionals to provide procedural information to patients before touching.<sup>107</sup> Practitioners are not permitted to be alone with youth under sixteen.<sup>108</sup>

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<sup>102</sup> Pépin-Gagné, *supra* note 100 at 162; Parent, *supra* note 73 at 330.

<sup>103</sup> Parent, *supra* note 73 at 329.

<sup>104</sup> *Supra* note 78; Pépin-Gagné, *supra* note 100 at 163.

<sup>105</sup> Pépin-Gagné, *supra* note 100 at 163.

<sup>106</sup> College of Physicians and Surgeons of Ontario, "Boundary Violations" (September 2008, updated December 2019) online: ipso.on.ca <<https://www.cpso.on.ca/Physicians/Policies-Guidance/Policies/Boundary-Violations>>; V Aravind, V Krishnaram & Z Thasneem, "Boundary Crossings and Violations in Clinical Settings" (2012) 34:1 *Indian J Psych Med* 21; Elad Schiff et al, "Development of Ethical Rules for Boundaries of Touch in Complementary Medicine – Outcomes of a Delphi Process" (2010) 16:4 *Complementary Therapies in Clinical Practice* 194.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

No sexual humour, language or sexual touching is ever acceptable. Patients should be left alone to dress and undress. Patients should be informed that they can stop the procedure at any time.<sup>109</sup> These same practices should be possible in sport. The coach-athlete relationship will not be harmed if the coach asks before placing hands on an athlete when spotting for a dangerous move, during demonstrations, or when explaining techniques.<sup>110</sup>

It is essential to protect coaches, athletes and the reputation of sport by creating and enforcing clearly stated policy and explicit discipline procedures. It is also important to provide education for those impacted by the measures so that they understand the ethical reasons for the behavioural protocol and do not feel threatened by it.<sup>111</sup>

#### **6.4.9 Athlete Vulnerability**

The *1989 UN Convention on the Rights of the Child* recognizes that children require special protection because of their inherent vulnerability.<sup>112</sup> Children are considered vulnerable because of their lack of maturity and their dependence on adults for protection, food and shelter. Elite athletes are potentially at risk for maltreatment because of their unusual dependence on coaches and other sport authority figures, consequently they also require special protection because of their uniquely dependent circumstances.

Athletic coaches almost always hold an elevated position of trust and authority in relation to the athletes they coach.<sup>113</sup> This is particularly true in the case of elite athletes who may be entirely dependent on coaches for their basic needs, including eating and sleeping arrangements, medications, education, as well as social interactions, travel, training,

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<sup>109</sup> *Ibid.*

<sup>110</sup> Gretchen Kerr & Ashley Stirling, "Negotiating Touch in the Coach-Athlete Relationship" (2013) 35 *J Sport & Exercise Psychology* S94.

<sup>111</sup> Pépin-Gagné, *supra* note 100 at 162; Parent, *supra* note 73 at 329-330.

<sup>112</sup> UN, *Convention on the Rights of the Child*, Resolution 44/25, New York (1989), online: <<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>>.

<sup>113</sup> Kerr, *supra* note 7 at 751; Brackenridge, *supra* note 55 at 333.

competition opportunities, schedules, as well as selection for and position on a team. Elite athlete coaches may control almost every aspect of an athlete's life, sometimes this even includes whether athletes are permitted to have romantic relationships. There is often an implicit understanding that the coach controls an athlete's path to the Olympics or access to professional sport opportunities and that without the support of the coach, the athlete's career could not succeed.<sup>114</sup>

## **6.5 Recommendations and Legislative Proposals**

### **6.5.1 Mandatory Reporting Legislation**

As discussed at length in Chapter Three, athletes habitually underreport maltreatment because of manipulation, threats, coercion and worries about repercussions.<sup>115</sup> If athletes are frequently unable to represent themselves, and sport organizations usually have other priorities, perhaps the most promising route to effective athlete protection from maltreatment is through the legal system.<sup>116</sup> The following discussion on mandatory reporting legislation, and the reasons it is currently failing in Canada, is important in itself, but also to better understand the confusing lack of action from those who suspect, or may have suspected, athlete maltreatment.

Everybody knows about it, but they just don't do anything about it. They are just like 'oh yeah he's pretty [questionable in his coaching style]....' But they don't actually talk about it. They don't want to rock the boat. They don't want to make trouble.... There is not a lot of oversight... so a lot of that behaviour either isn't seen, or again its just a rumour and you don't act on a rumour and you don't want to falsely accuse. - Athlete Eleven

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<sup>114</sup> Kennedy, *supra* note 80.

<sup>115</sup> Brackenridge, *supra* note 90 at 54; Kennedy, *supra* note 80 at 74.

<sup>116</sup> Katherine Hampel, "Whose Fault is it Anyway? How Sexual Abuse Has Plagued the United States Olympic Movement and Its Athletes" (2019) 29:2 *Marquette Sports L Rev* at 547.

There were two other assistant coaches that were aware.... I found out in the trial that he definitely knew.... These people should be held responsible today.... She knew and she is another one that did nothing. And the worst is that these three adults could have saved eleven other athletes [from sexual abuse]. - Athlete Six

Queensland University of Technology law professor, Ben Mathews, explains that a major obstacle in attempting to address institutional child sexual abuse is that sexual abuse is so infrequently reported to authorities.<sup>117</sup> Because institutional abuse usually occurs in a power imbalance relationship, individuals subjected to abuse are rarely in a position to report the maltreatment.<sup>118</sup> Official figures on reported child sexual abuse are not consistent with figures from sexual abuse numbers in population incidence studies, consequently academics have concluded that a large part of child abuse is unreported.<sup>119</sup> Chapter Three elaborated on the various factors preventing athletes from reporting their maltreatment.<sup>120</sup>

Mathews' research focuses on sexual abuse in youth serving institutions, which specifically encompasses youth participants in organized sport. He recommends legislating to create mandatory reporting of sexual abuse in child and youth serving institutions. He states that law has been used effectively to regulate other public health issues such as pollution and personal safety, and that it could be equally effective in addressing sexual abuse.<sup>121</sup>

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<sup>117</sup> Mathews, *supra* note 82.

<sup>118</sup> Emma Davies, Ben Mathews & John Reid, "Mandatory Reporting? Issues to Consider When Developing Legislation and Policy to Improve Discovery of Child Abuse" (2014) 2:1 IALS Student L Rev at 10.

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

<sup>120</sup> Mike Hartill, "The Sexual Abuse of Boys in Organized Male Sports" (2009) 12:2 Men & Masculinities at 225; Brackenridge, *supra* note 90 at 54.

<sup>121</sup> Mathews, *supra* note 82.

Legislation is frequently opposed by those being regulated and it is common for legislators and government officials to reject legislative interference and side with the industry position.<sup>122</sup> Mathews says that the persistent lack of effective regulatory legislation for public health issues, such as child sexual abuse, leads to inconsistent measures and wasted resources through duplication of efforts.<sup>123</sup> This statement aptly describes the current situation with respect to athlete maltreatment, the costly duplication of efforts by individual sport organizations and the lack of government interference or any independent external regulation.

Mathews also questions whether it is realistic to expect morally-driven decision making and genuine commitment to policy objectives from institutions which are likely to have other priorities.<sup>124</sup> History and experience suggest that regulatory compliance is most likely to come from a desire to avoid penalties and litigation, and since vulnerable populations cannot be expected to represent themselves, when stakes are high, and the organizations involved are ideologically and geographically disconnected, government regulation is the best strategic approach for creating institutional compliance.<sup>125</sup>

Canada, the United States and Australia are already considered world leaders in mandatory child maltreatment reporting legislation.<sup>126</sup> The United States was the first country to introduce mandatory reporting of child abuse in the 1960s.<sup>127</sup> The legislation

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<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

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

<sup>125</sup> *Ibid.*

<sup>126</sup> Gibbons, *supra* note 53.

<sup>127</sup> Anne Vulliamy & Richard Sullivan, "Reporting Child Abuse: Paediatricians' Experiences With the Child Protection System" (2000) 24:11 *Child Abuse and Neglect* 1461 at 1462; Ben Mathews, "Mandatory Reporting Laws, Their Origin, Nature, and Development Over Time", in Ben Mathews and D Bross, eds, *Mandatory Reporting Laws and the Identification of Severe Child Abuse and Neglect*, (Dordrecht: Springer, 2015) 3; "Mandatory Reporting: Existing Obligations to Report Child Sexual Abuse", (2018) Independent Inquiry Child Sexual Abuse UK: Seminar Briefing Note, online: <<https://www.iicsa.org.uk/key-documents/7025/view/mandatory-reporting-seminar-existing-obligations-reporting-child-sexual-abuse.-briefing-note.pdf>>.

initially focused on physical abuse inflicted on children by parents, and required medical professionals to report suspected child abuse.<sup>128</sup>

Australia and then Canada both followed with their own legislation shortly thereafter. Each of these countries eventually expanded their legislation to mandate reporting by other individuals and to cover other forms of abuse, including sexual abuse and neglect.<sup>129</sup> Countries that do not have legislated mandatory reporting for all citizens, like the United Kingdom, may nonetheless have mandatory reporting in specific professions, such as health professions or education, that are governed by their own professional codes of conduct.<sup>130</sup>

In Canada, mandatory reporting of child maltreatment is provincially legislated and all provinces and territories have current legislation that requires reporting.<sup>131</sup> The definition of “child” ranges from 15-18 years depending on the province or territory. The Nova Scotia legislation, under the *Children and Family Services Act*, SNS 1990, requires under Section 23.1 that **anyone** with information that a child requires protection must report this to an agency, regardless of any applicable rules of confidentiality or privilege.<sup>132</sup>

Section 24 of the Nova Scotia Act explains the duties, of professionals dealing with children, to report abuse or reasonable suspicion of abuse in the present or future.<sup>133</sup> Section 25 refers to third party physical, sexual or emotional abuse by someone other than a parent or guardian. It states that all adults who become aware of, or suspect abuse

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<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

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

<sup>131</sup> Some examples of Canadian provincial legislation: *Child, Youth and Family Services Act, 2017*, SO 2017, c 14, Sch 1; *Child, Family and Community Service Act*, RSBC 1996, c 46; *Children and Family Services Act*, SNS 1990, c 5, 23.

<sup>132</sup> *Children and Family Services Act*, SNS 1990, c 5, 23.

<sup>133</sup> *Ibid.*



must report this to an agency. Contravention of this legislation may incur a fine of up to \$2,000, six months in prison, or both. For professionals the fine can be up to \$5,000.<sup>134</sup>

Canadian mandatory child abuse reporting legislation has received worldwide accolades, and it is the institutional measure considered most important by Mathews, yet the legislation seems to have had little practical impact. Those with a professional responsibility to report child maltreatment should be aware of their obligation through their professional organizations, but very few official reports of abuse ever come from Canadian health professionals or community services,<sup>135</sup> and most other Canadian citizens, who do not work in education, community services or the health professions, remain completely unaware that they have a legislated duty to report child or youth maltreatment and suspected maltreatment.<sup>136</sup>

Underreporting by health professionals continues to be a huge problem in Canada in spite of explicit provincial legislation, and professional codes of conduct, which make reporting mandatory.<sup>137</sup> This is somewhat surprising considering the potentially heavy penalties for failing to report, the low threshold for what must be reported, and the general and inclusive wording of the legislation, which requires reporting for any reasonably suspected current and/or future harm, rather than just proven harm.<sup>138</sup>

The flaw in the legislation may be its total reliance on the expectation that individuals in community services, the health professions, and other citizens, most of whom have no training or education in child maltreatment issues, will be sufficiently confident to assess

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<sup>134</sup> *Ibid.* Note: Manitoba has the stiffest penalties in Canada with a maximum of \$50,000 and two years in jail. See *Child and Family Services Act*, CCSM c C80, 18.3

<sup>135</sup> Barbara Fallon, et al, *Ontario Incidence Study of Reported Child Abuse and Neglect—2013* (OIS- 2013) (Toronto: Child Welfare Research Portal, 2015) at 48.

<sup>136</sup> Kayla Gordon, “Good Intentions, Questionable Results: The Shortcomings of Mandated Reporting for Child Maltreatment, 2019, Canlidocs 5 at 9, online: <<https://doi.org/10.5206/uwojls.v9il.6826>>.

<sup>137</sup> Lil Tonmyr et al, “Patterns of Reporting by Health Care and Non-healthcare Professionals to Child Protection Services in Canada” (2010)15:J Paediatrics & Child Health, at e25; *Ibid.*

<sup>138</sup> Christine Wekerle, “Resilience in the Context of Child Maltreatment: Connections to the Practice of Mandatory Reporting” (2013) 37:2-3 Child Abuse & Neglect 93 at 94; Gordon, *supra* note 136 at 6.

the possibility of harm that might occur to a child, now or in the future.<sup>139</sup> The situation is further complicated because each individual brings their own interpretation of what is reasonable, when a child or youth might require protection and, as previously discussed, what kind of punishment of children, including corporal punishment, is culturally and socially acceptable.

When individuals do recognize they have a personal obligation to report maltreatment, they are often unaware or confused about the procedure that should be followed. This has proven to be a problem for health professionals and would likely be even more significant for laypeople.<sup>140</sup> In spite of the fact that courts have tended toward leniency for anyone not reporting out of malice, fear of legal repercussions is often indicated, particularly by health professionals, as a primary reason for not reporting.<sup>141</sup> Potential financial and personal costs may also prevent reporting,<sup>142</sup> as well as previous negative experiences with child protective services. Some health professionals have indicated that they fear the case will be badly handled by child protective services,<sup>143</sup> or they may have concerns that the child protection system is overloaded.<sup>144</sup>

Physicians have occasionally reported that they believed they were in a better position to address maltreatment issues themselves, thereby causing less harm and disruption to the family.<sup>145</sup> Sometimes healthcare professionals may be loathe to relinquish control of the process,<sup>146</sup> or concerned about triggering fear of child apprehension.<sup>147</sup> When healthcare

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<sup>139</sup> Gordon, *supra* note 136 at 9; Parent, *supra* note 73 at 128.

<sup>140</sup> Anne Marie Pietrantonio et al, "Mandatory Reporting of Child Abuse and Neglect: Crafting a Positive for Process for Health Professionals and Caregivers" (2013) 37 Child Abuse & Neglect 102 at 103.

<sup>141</sup> Tonmyr, *supra* note 137 at e30.

<sup>142</sup> Vulliamy *supra* note 127 at 1468.

<sup>143</sup> Diane Walters, "Mandatory Reporting of Child Abuse: Legal, Ethical & Clinical Implications Within a Canadian Context" (1995) 36:3 Can Psych 163 at 171.

<sup>144</sup> Tonmyr, *supra* note 137, at e30.

<sup>145</sup> Pietrantonio, *supra* note 140 at 104.

<sup>146</sup> Walters, *supra* note 143 at 174.

<sup>147</sup> Danielle Davidov et al, "Mandatory Reporting in the Context of Home Visitation Programs: Intimate Partner Violence and Children's Exposure to Intimate Partner Violence" (2012) 18:5 Violence Against Women 595 at 600.

workers wish to maintain a professional working relationship with family members, they may be concerned about reporting a suspected incident.<sup>148</sup>

When cases of maltreatment are unreported, it is known that there is a high likelihood of recurrence and that other children in the family are at increased risk.<sup>149</sup> (This is likely to be true for other children on a team in a sport setting.) Because the potential for further harm in these situations is so great, it is important to find ways to improve legislative compliance. One suggestion is to do this through stricter follow up and harsher penalties.<sup>150</sup> The current range of provincial financial penalties ranges roughly from a maximum fine of \$2,000 in Nova Scotia, to \$50,000 for professionals in Manitoba,<sup>151</sup> but it is clear that most professionals who choose not to report are not deterred from their decisions by the existence of penalties, regardless of the amount.<sup>152</sup>

A more likely means to improving maltreatment reporting is through education. If professionals are better trained to understand and recognize maltreatment they will be more comfortable reporting suspected incidents. One program that showed impressive results in a hospital setting, involved the mandatory use of a check list, extensive staff training on maltreatment, and following up any staff concerns by engaging a second opinion from a medical professional.<sup>153</sup> A nation-wide system providing ongoing, consistent, evidence-based maltreatment education is essential,<sup>154</sup> and when individuals do become involved with mandatory reporting procedures, there should be supports

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<sup>148</sup> Tonmyr, *supra* note 137 at e30.

<sup>149</sup> Pietrantonio, *supra* note 140 at 104.

<sup>150</sup> Gordon, *supra* note 136 at 13.

<sup>151</sup> *Children and Family Services Act*, SNS 1990, c 5, 23; *Child and Family Services Act* CCSM 1985 c. C80.

<sup>152</sup> Gordon, *supra* note 136 at 14.

<sup>153</sup> Wekerle, *supra* 138 at 97.

<sup>154</sup> *Ibid* at 98.

available for all of those involved, including the individual reporting the maltreatment.<sup>155</sup>

A functioning mandatory reporting system for maltreatment of athletes will require collaboration and consultation between sport organizations, health professionals, community services, education and child protective services.<sup>156</sup> Changing behaviour to encourage reporting will require national education on legislative obligations of adults in each province and territory. Compliance with the legislation will only happen when there is greater understanding of athlete maltreatment issues, promotion of trust in the system, and the imposition of sanctions for lack of compliance.

The ineffectiveness of current mandatory reporting legislation for child maltreatment in Canadian provinces and territories appears primarily to stem from reliance on individual interpretation of the legislation. The intentionally general, inclusive and vague legislative wording can lead to interpretive uncertainty. Internal belief systems at organizations may conflict with the legislative goals, and the lack of follow up or penalties for non-compliance can make individuals take the legislation less seriously.<sup>157</sup> These factors also influence the lack of maltreatment reporting in sport.

Furthermore, most healthcare and sport professionals do not receive training on how to recognize, or when to report athlete maltreatment and it is left to them to educate themselves on their responsibility.<sup>158</sup> One of the outcomes of this is that physical maltreatment is most often reported, as it is more easily assessed than other types of maltreatment, while psychological maltreatment continues to be widely misunderstood and underreported.<sup>159</sup> History shows that little is likely to change unless policy is

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<sup>155</sup> Davidov, *supra* note 147 at 420.

<sup>156</sup> Tonmyr, *supra* note 137 at e31.

<sup>157</sup> Walters, *supra* note 143 at 166.

<sup>158</sup> *Ibid* at 167.

<sup>159</sup> Gordon, *supra* note 136 at 8.

accompanied by education, with follow up and enforcement of punitive measures.<sup>160</sup> When no one takes ownership and there is no oversight and no back up system, measures are likely to be ineffective.<sup>161</sup>

The experiences of health professionals, who chose not to comply with mandatory reporting obligations,<sup>162</sup> may provide potential explanations for why sport officials, and others known to have had knowledge of athlete maltreatment, have avoided reporting. In addition to the problem that child maltreatment legislation is only applicable to minors (age depends on the province and territory), it is a significant issue that most Canadian citizens appear to be unaware of the legislated mandatory reporting obligation.

Those who are aware of their obligation to report sport maltreatment may be silenced by fear of getting involved in a complaint process or legal battle.<sup>163</sup> There may be financial and personal concerns.<sup>164</sup> There may be individuals who think they can do a better job by handling the situation internally. There may be officials who do not want to give up control and who may be trying to protect individuals or the sport organization.<sup>165</sup> There may be concerns about the impact on future working relationships.<sup>166</sup> These have all been identified as explanations for non-compliance with mandatory reporting legislation in general, but they are equally at play in safe sport mandatory reporting .

There is a historical tendency for sport organizations to deny the existence of systemic maltreatment in sport. This may be associated with sport organizations wishing to hold onto power and preserve independence.<sup>167</sup> They may feel threatened by governments being pressured by the public to regulate, and academics and individuals calling for a

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<sup>160</sup> Gordon, *supra* note 136 at 8.

<sup>161</sup> Parent, *supra* note 73 at 125.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> Kerr, *supra* note 7 at 751.

neutral body to provide independent oversight.<sup>168</sup> When the problem, in this case athlete maltreatment, is so deeply embedded in the culture, and when there is a lack of commitment to creating new humanitarian priorities within sport organizations,<sup>169</sup> and when there have been internal cover ups, and conscious decisions to protect reputation over athlete wellbeing, at this point, the will to establish and enforce effective safe sport procedures must be questioned<sup>170</sup> and that leaves no other option but to force compliance through legislation and sanctions.

Before discussing other possible legislative interventions, the importance of mandatory reporting should be acknowledged in spite of its current shortcomings. As Mathews established, since it is unrealistic to expect most athletes to speak up for themselves, the onus is therefore on the community. Most individuals will be primarily motivated to act out of fear of sanctions.<sup>171</sup> It is for these reasons that I recommend giving mandatory reporting legislation a fresh start in Canada.

In this me-too era of constant multimedia exposure, it should be straightforward, and relatively inexpensive, to create a national public awareness campaign to spread the message that all adults in Canada have a legal responsibility to report suspected maltreatment of athletes who are minors. This responsibility applies to all staff and executives in all sport organizations, all coaches, parents, volunteers, bystanders and community members. If this responsibility is clearly and widely understood, and if there are publicized examples of sanctions being brought against individuals who have failed to act, more cases of maltreatment will be brought to the attention of authorities and more athletes will be protected from harm.

Education can also help to ensure mandatory reporting legislation compliance and could change perspectives and behaviour. It is important to begin to build working relationships

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<sup>168</sup> *Ibid* at 754.

<sup>169</sup> Parent, *supra* note 73 at 126.

<sup>170</sup> Lanning, *supra* note 83.

<sup>171</sup> Mathews, *supra* note 82.

between organizations and to encourage consultation, collaboration and trust in the system, rather than bias, insularism and secrecy. Creating supports for those who engage in a difficult process, tightening legislative language to leave less interpretive leeway and preparing a checklist so that decisions are not left to individual interpretation and judgment, will all have an impact on the success of this legislation in the future.<sup>172</sup>

## **6.5.2 Physical Activity and Sport Act**

Healthy institutional culture begins with education. Leadership, modelled daily throughout the organization, and demonstrated through policy and practice, can guide and shape the behaviour of those within the organization.<sup>173</sup> Elite sport organizations can learn from legislative measures to address harassment and abuse in the professional world. The Canadian government recently adopted workplace strategies to address harassment, violence and complaints of a poisoned work environment, through an amendment of the *Canada Labour Code* with *Bill C-65*.<sup>174</sup>

*Bill C-65* requires that government offices must proactively address harassment and violence in the workplace. They must perform internal risk assessment, design office harassment protections, initiate policies for responding to complaints and designate a staff member as the official receiver of complaints. Preventative training is also mandatory at all employment levels, as are publicized systems for reporting, investigating, record keeping, and supporting complainants.”<sup>175</sup>

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<sup>172</sup> Gordon, *supra* note 136 at 8.

<sup>173</sup> Donald Palmer & Valerie Feldman, “Toward a More Comprehensive Analysis of the Role of Organizational Culture in Child Sexual Abuse in Institutional Contexts” (2017) 74 *Child Abuse & Neglect* 23.

<sup>174</sup> *Bill C-65: An Act to Amend the Canada Labour Code (harassment and violence), the Parliamentary Employment and Staff Relations Act and the Budget Implementation Act, 2017*, No. 1 (Royal Assent on October 25, 2018).

<sup>175</sup> Julius Melnitzer, “New Workplace Harassment Law Will Be Real ‘Game Changer’ For Employers” *Financial Post* (27 Aug 27 2019), online: <<https://business.financialpost.com/legal-post/new-workplace-harassment-law-will-be-real-game-changer-for-employers>>.

The legislation was created in response to a 2017 survey that indicated that 60% of survey respondents had been harassed at work. 41% indicated that an incident they reported was not resolved, and 72% of respondents neglected to report their harassment because of concerns about office reaction and impact on their careers.<sup>176</sup> The majority of reported harassment complaints were categorized as bullying or intimidation and frequently, the offender was a co-worker.<sup>177</sup>

This closely mirrors feedback from national team athletes about maltreatment in sport. The most frequently reported maltreatment was psychological, and most often, the offender was a peer.<sup>178</sup> If the Canadian government can respond this rapidly (less than two years) to a workplace survey, creating legislation and policy for the prevention of workplace harassment of adults, it is not unreasonable to demand similar measures be engaged to protect athletes from maltreatment in sport.

In the way that *The Canada Labour Code* was amended to include workplace violence and harassment protections, a similar amendment to the *Physical Activity and Sport Act 2003*,<sup>179</sup> could legally require sport organizations to do the same. The objectives of this act already state:

3. The objectives of the Government of Canada's policy regarding physical activity are:

(a) to promote physical activity as a fundamental element of health and well-being;

(b) to encourage all Canadians to improve their health by integrating physical activity into their daily lives; and

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<sup>176</sup> Lori Sterling, "Bill C-65: Harassment, #MeToo and You" Bennett Jones (03 December 2018), online: <<https://www.bennettjones.com/Blogs-Section/Bill-C65-Harassment-MeToo-and-You>>.

<sup>177</sup> Melnitzer, *supra* note 175.

<sup>178</sup> Kerr, *supra* note 2.

<sup>179</sup> *Physical Activity and Sport Act* (S.C. 2003, c. 2)



(c) to assist in reducing barriers faced by all Canadians that prevent them from being active.

History suggests that legislation of this kind will only succeed if there is sufficient financial investment and educational training associated with the measures to promote engagement and support follow-up. Just as Perrow required systemic industrial backups, there must be effective administrative checks in place to make sure innovative objectives in safe sport are properly met. If no one is given responsibility for the success of the innovation, and bias, or the distraction other priorities, are allowed to diminish organizational commitment to objectives, legislation alone may be ineffective.<sup>180</sup> Legislation can however provide a strong starting point, as it makes a clear public statement about the national mission and values of sport. It is therefore recommended that the *Physical Activity and Sport Act* is amended to include athlete maltreatment protections and policy requirements.

### **6.5.3 Labour Legislation**

There are other ways to use federal and provincial legislation for the protection of athletes. In the past, some athletes have needed to be protected from their own parents. When parents stop working and live exclusively from their young athlete's income, performance pressure may be accelerated.<sup>181</sup> A parent's drive for vicarious fame and fortune can increase the likelihood of athlete maltreatment.<sup>182</sup> Athletes with over-involved parents may be afraid to come to their parents with complaints about maltreatment by a coach. In some cases parents may be so over-invested that when their child does complain, they may believe the coach over their child.<sup>183</sup> Parents of elite

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<sup>180</sup> Gordon, *supra* note 136.

<sup>181</sup> Peter Donnelly & Leanne Petherick, "Workers' Playtime? Child Labour at the Extremes of the Sporting Spectrum" (2010) 7:3 Sport Society 301 at 317.

<sup>182</sup> Erica Siegal, "When Parental Interference Goes too Far: The Need for Adequate Protection of Child Entertainers and Athletes" (2000) 18 Cardozo Arts & Ent L J 427 at 462.

<sup>183</sup> Ryan, *supra* note 58.

athletes have reflected that their state of mind was “insane” when they recall the ambition they once had for their child.<sup>184</sup>

Some athletes have engaged the courts to protect themselves from parental misuse of financial earnings associated with their sport success.<sup>185</sup> This was the route taken by American gymnasts, Mary Lou Retton, Shannon Miller and Dominique Moceanu.<sup>186</sup> Moceanu received millions in appearance fees and endorsements after winning team gold for the USA in 1996. In 1999, Moceanu was granted emancipation from her parents who had quit their jobs and spent most of her money without her approval.<sup>187</sup>

Extending child labour legislation to include elite athletes could protect child athlete income by requiring that a percentage of earnings be placed in trust for the child, as is now done routinely in the entertainment industry.<sup>188</sup> Although there is no legislation regulating child athlete training and protection of athletic income, provincial legislation has been enacted in Ontario<sup>189</sup> and British Columbia<sup>190</sup> regarding child and youth performers working in the entertainment industry.

In Ontario, *Bill 17, The Protecting Child Performers Act*, 2015, specifies how long children, at various ages, can work without breaks, including a daily limit. It provides regulations for child health and safety, meal requirements, education controls, the right to refuse to work, the necessity of full-time parental presence on a set and the requirement that the child’s entertainment income is placed in a trust fund for the child.<sup>191</sup> Other provinces have chosen to leave this oversight with the national and provincial actors’

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<sup>184</sup> *Ibid* at 148.

<sup>185</sup> Siegal, *supra* note 182 at 439.

<sup>186</sup> *Ibid* at 427. Note: All three of these athletes were granted legal emancipation.

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

<sup>188</sup> *Ibid*; Donnelly, *supra* note 181.

<sup>189</sup> *Protecting Child Performers Act*, 2015, SO 2015, c 2 - Bill 17.

<sup>190</sup> *Children in Live Entertainment Industry* - Regulation Part 7.1, Division 3.

<sup>191</sup> Associated Press, “South Korean Olympic Gold Medallist Shim Suk-hee Allegedly Beaten by Coach”, CBC Sports (18 Jan 2018), online: <<https://www.cbc.ca/sports/olympics/winter/speedskating/michael-crowe-speed-skating-canada-investigation-1.4494450>>.

unions.<sup>192</sup> The Alliance of Canadian Cinema, Television and Radio Artists (ACTRA) created the Independent Production Agreement (IPA) and the National Television and Radio Commercial Agreement (NCA)<sup>193</sup> which provide terms for adult and child employment<sup>194</sup> in the entertainment industry, but with less strict regulations and lesser penalties than those provided by *The Protecting Child Performer's Act*. Actra, like many other self-regulating organizations, feels that, given their expertise, this responsibility is better managed by them than through government legislation.<sup>195</sup>

The experience of children in the entertainment industry is comparable to that of children in high level sport, in that both activities may require long hours and challenging working conditions, but are considered to be enjoyable and voluntary activities for the participant. Most children do not make the decision to pursue careers in sport or entertainment independently however, and their participation in these fields is most often facilitated, if not entirely driven, by their parents. Those children who do achieve financial success, in television, film or in sport, may bring fame as well as financial reward to the whole family.

As Donnelly points out, it presents the unusual circumstance where the income of adults may rely on the successful performance of a child and the child, in the case of the child athlete, has very little legal protection.<sup>196</sup> Legislation, designed for the protection of elite young athletes, based on the Ontario and British Columbia child performer legislation, would likely be resisted by sport authorities, but is nonetheless a practical, inexpensive and logical step that could be carried out by provincial and territorial governments.

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<sup>192</sup> Actra, online: [actra.ca <https://www.actra.ca/prs/minors-trust/faq/>](https://www.actra.ca/prs/minors-trust/faq/).

<sup>193</sup> Independent Production Agreement (IPA) 2019-2022, and the National Television and Radio Commercial Agreement (NCA) 2017-2020, online: [<https://www.actra.ca/agreements/>](https://www.actra.ca/agreements/).

<sup>194</sup> *Ibid*; See A2716 of the IPA and Article 1611 of the NCA.

<sup>195</sup> Melnitzer, *supra* note 175.

<sup>196</sup> Donnelly, *supra* note 181.

Chapter Two included a brief discussion of the potential safe sport application and impact of the United Nations' *Convention on the Rights of the Child*.<sup>197</sup> Article 32 of the Convention protects children in the labour force, stating the right to be "...protected from economic exploitation, and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development."<sup>198</sup> Donnelly, suggests Article 32 could be used to encourage the Canadian government to protect child athletes.<sup>199</sup> The federal government is unable to create laws regarding child labour because Canadian labour law regulation falls to the jurisdiction of the provinces and territories under the Canadian Constitution. The federal government could nevertheless recommend policy and support its implementation.<sup>200</sup>

The World Labour Report (WLR)<sup>201</sup> states that all child labour is in fact forced labour.<sup>202</sup> The WLR describes child labour as a situation where children "are being exploited, or overworked, or deprived of their rights to health and education."<sup>203</sup> In the most extreme sport trafficking and maltreatment cases, children are kidnapped, or bought and trafficked to become camel jockeys or told they will have the opportunity to become elite soccer players.<sup>204</sup> In cases where the child has had no part in the decision,<sup>205</sup> their sport participation in these cases is arguably a form of forced labour. To a lesser extent, parents who decide that their children should become elite athletes, particularly those who live

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<sup>197</sup> UN Commission on Human Rights, *Convention on the Rights of the Child*, 7 March 1990, E/CN4/RES/1990/74, online: <<https://www.refworld.org/docid/3b00f03d30.html>> [accessed 14 July 2020].

<sup>198</sup> *Ibid* at Article 32.

<sup>199</sup> Donnelly, *supra* note 181.

<sup>200</sup> Children's Rights: Canada, Library of Congress, Law, Child Labour and Exploitation, online: <<https://www.loc.gov/law/help/child-rights/canada.php>>.

<sup>201</sup> *World Labour Report* (1993) Ch 1 : 'Forced Labour', Geneva : International Labour Office.

<sup>202</sup> *Ibid* at 17.

<sup>203</sup> *World Labour Report* (1992) Ch 1 : 'Human Rights at Work', Geneva : International Labour Office at 14.

<sup>204</sup> Peter Donnelly, "Child Labour, Sport Labour: Applying Child Labour Laws to Sport" (1997) 32:4 Int Rev Soc Sport 389 at 393; Donnelly, *supra* note 181 at 307.

<sup>205</sup> *Ibid*.

off of their child's sport income, are also engaging in a form of exploitation. Elite child athletes may be overworked, and deprived of their rights to health, rest and education.

Characteristics of child labour include: "working too young, working long hours, working under strain, working for little pay, working with little stimulation, taking too much responsibility, being subject to intimidation and working on the streets".<sup>206</sup> Child labour is described as, "Children prematurely leading adult lives, working long hours for low wages under conditions damaging to their health and to their physical and mental development, sometimes separated from their families, frequently deprived of meaningful education and training opportunities that could open up for them a better future."<sup>207</sup>

Child high performance athletes often meet all the criteria listed in these descriptions, with the exception of working on the street and sometimes with respect to taking too much responsibility. Although many young athletes have no ability to make decisions or to give input regarding their athletic careers, conversely the argument can be made that in some cases young athletes are expected to take on too much responsibility and that neither situation is appropriate for a child.<sup>208</sup>

When Canadian child labour laws were introduced in the late 1800s, parents insisted children were working voluntarily and children said they wanted to work rather than go to school. This included children who worked in unhealthy environments and those subject to abuse.<sup>209</sup> The business community was concerned that the economy could be devastated by the loss of cheap child labour. Child labour laws were introduced in spite of the opposition.<sup>210</sup> Donnelly anticipates that coaches and parents would say their child athletes train and compete voluntarily.<sup>211</sup> It is therefore entirely foreseeable that parents

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<sup>206</sup> *Ibid*; Donnelly, *supra* note 181 at 303.

<sup>207</sup> Francis Blanchard former Director of International Labour Organization, cited in J Gathia, "Approaches to Combatting Child Labour in India" (1998) 48: 4 *Caritus India Quarterly* at 12.

<sup>208</sup> Donnelly, *supra* note 181.

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

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

<sup>211</sup> *Ibid*.

and coaches might oppose legislation designed to protect elite child athletes' health and restrict their training time.

In no other occupation or profession, even for adults, would the high rate of burnout, the high rate of overuse injuries, the serious potential for traumatic injury, the serious possibility of long-term disability (e.g. arthritis or growth-plate damage), the administering of drugs and the enforcement of unsafe dietary practices, and the possible abuse and harassment of employees be allowed to pass without question.”<sup>212</sup>

Donnelly also notes the total lack of control over number of hours committed to training and competing, the lack of enforcement of educational requirements and the absence of health and safety standards.<sup>213</sup> He suggests that athletes should be required to give informed consent for athletic participation and that clubs and coaches need to be educated on their legal fiduciary duties.<sup>214</sup> However, without consistent ongoing evidence-based education, impartial investigations, and enforcement of penalties for breached regulations, the existence of signed contracts may provide athletes with little protection.

Siegal recommends creating a work permit system for child elite athletes that is similar to the one used in the state of California for child entertainers.<sup>215</sup> This would not directly impact the experiences of recreational athletes, or of elite athletes over the age of 18, but it could establish important boundaries and protections for the most vulnerable child elite athletes. Siegal proposes more stringent requirements than the entertainment world's current reliance on schools certifying that the child is maintaining a desired academic standard. Siegal recommends that children wishing to commit to training to be elite athletes should submit to a personal interview that would also serve as a psychological

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<sup>212</sup> Donnelly, *supra* note 204 at 394.

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

<sup>214</sup> *Ibid.*

<sup>215</sup> Siegal, *supra* note 182 at 465.

test to determine the child's level of commitment and motivation independent from the intentions of their parents.<sup>216</sup>

Opportunity for fame and financial reward has increased emphasis on early athletic performance, which is often associated with long hours of demanding training, sometimes with disregard for the athlete's mental and physical health and education.<sup>217</sup> This has created the potential for long term injury and harm to young athletes who may have little insight or ability to responsibly choose whether they wish to pursue this path. The risk to modern-day athletes is heightened by ever-increasing skill levels, faster speeds, and more dangerous stunts, all of which often require entry into the sport at younger ages and longer hours committed to training.<sup>218</sup>

Sport and media networks strive to provide increasingly exciting sport entertainment for their viewers, suggesting that sport really forms part of the entertainment industry.<sup>219</sup> While the entertainment industry has created protections for child and youth actors through legislation and union agreements, non-professional sport is not recognized as professional entertainment or a form of work, in spite of the fact that elite sport meets most of the criteria for child labour and is sold to television networks as entertainment.<sup>220</sup>

Donnelly believes that the best interests of the athlete should guide policy for all of sport.<sup>221</sup> Since the sport system, particularly at the highest levels, is financially and results driven, the best interests of athletes are rarely the first priority. When the income of adults (and this may include parents and the entire team of coaches, administrative personnel, trainers, and medical support staff) is dependent on the successful performances of athletes, this sometimes leads to an emphasis on results over the health

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<sup>216</sup> *Ibid.*

<sup>217</sup> Donnelly, *supra* note 181 at 312.

<sup>218</sup> Ryan, *supra* note 58.

<sup>219</sup> Donnelly, *supra* note 181 at 317.

<sup>220</sup> *Ibid.*

<sup>221</sup> *Ibid.*

and well-being of the athlete.<sup>222</sup> The creation of provincial labour legislation to protect the interests of elite athletes could make a significant difference in their psychological and physical health, financial security, as well protecting their right to education. It would be a simple and inexpensive action to take and is therefore strongly recommended. Unfortunately these measures will have little impact on athletes experiencing maltreatment who are not training at the elite level, or for athletes over eighteen, and for those cases the criminal law is likely to be the best answer.

#### **6.5.4 Criminal Law**

Child labour legislation could help protect young elite athletes from physical maltreatment, neglected education, and financial abuse, but athletes who are subjected to sexual abuse, and those who are not children, need additional legal protection. Current Canadian *Criminal Code* provisions, discussed in Chapter Two, provide insufficient protection from sexual abuse, particularly for athletes who are over eighteen at the time of the crime. This is a frequently cited explanation for why many athletes never come forward about their sexual abuse.

Dad never believed how bad it was... He wants to believe his daughter, but I think they sort of took the ‘Well, you were 18. You should have known better.’ approach. - Athlete Seven

[Onlookers] tend to say, well she was 18... Oh well, she was 17 and a half, whatever... Then [in a relationship of trust] it’s actually 19 which none of us knew. - Athlete One

I was told that basically [in order to initiate criminal charges] I had to have been under 14 years of age and he had to physically rape me.... When I became involved with him I was 18 and so most of my shame and everything in the last 20 years has to do

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



with the fact that I was older and I should have known better.... A lot of [criminal law] pertains to minor athletes, and I one hundred percent respect that, but in my experience, abuse of power, the manipulation and coercion, the brainwashing, like it could have happened to a 50 year old woman as easily as a 16 year old. - Athlete Seven

Currently, under section 153.1(1) of the *Criminal Code*, a complainant with mental or physical disabilities who was sexually assaulted must prove that a sexual assault took place, and also that there was lack of consent and abuse of trust.<sup>223</sup> Benedet and Grant propose that when victims of sexual assault are women living with mental and physical disabilities, a legal presumption should be adopted in order to avoid the second and unnecessary step.<sup>224</sup>

They state that a complainant with a disability should not have to prove there was an abuse of trust, after a sexual assault occurs, but rather, there should be a presumption that an abuse of trust occurred, based on a legal acknowledgment of the expectation that there was an unequal relationship, unless there is convincing evidence to the contrary.<sup>225</sup> The presumption would suggest, under Section 5.1(3)(c), that no lawful consent was obtained by the accused. The existence of such a presumption is likely to provide deterrence because individuals working with people with disabilities would understand that they are being held to a higher standard, and they would recognize that the presumption would work against them in a court of law.

Many people with disabilities are in unequal relationships with family members as well as professionals, like doctors or therapists, who frequently have an unusual amount of

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<sup>223</sup> *Criminal Code*, RSC 1985, 273.1(2) c.

<sup>224</sup> Janine Benedet & Isabel Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief" (2007) 52 McGill L J 243 at 285.

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

control over them.<sup>226</sup> A presumption, under Section 5.1(3)c, that there was an abuse of trust, unless there is clear evidence to the contrary would also be reasonable for elite athletes, given the power imbalance and resulting vulnerability in many of these relationships, and particularly in coach-athlete relationships.

Athletes over eighteen, who are sexually assaulted by a coach, could use Section 273.1(2)(c) to argue that consent was vitiated, even in situations where the offender indicates that consent appeared to have been given. Currently, Section 273.1(1.1) requires proof that there was sexual activity without consent.<sup>227</sup> Section 273.1 (2)(c) indicates that if the sexual activity occurred due to an abuse of trust, the consent is not valid, but this still currently requires proof that an abuse of trust was used to gain sexual gratification.

The Benedet and Grant presumption would mean that elite athletes would only have to prove that the sexual assault occurred and then raise the abuse of trust presumption to show that consent was vitiated. An abuse of trust would then be presumed, and this would apply regardless of the athlete's age, unless there was clear evidence to the contrary.

Benedet and Grant state that some complainants with mental disabilities may be unusually dependent on those who support them and that that dependence may extend to all of the individual's basic needs including personal care, transportation, and social needs.<sup>228</sup> They suggest that courts should examine whether the trust relationship and power imbalance was used by the perpetrator to obtain sexual gratification, and that the dependent relationship should be considered from the perspective of the complainant not the perpetrator.<sup>229</sup>

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

<sup>227</sup> *Supra* note 223.

<sup>228</sup> Benedet, *supra* note 224 at 285.

<sup>229</sup> *Ibid.*

Elite athletes may also experience abnormal levels of dependency on coaches. It is not uncommon for high performance athletes to depend on their coaches for nearly everything: dietary needs, accommodation, transportation, emotional support, personal and athletic guidance, recommendations for athletic advancement and awards, recommendations for sponsorship, technical support, medical support, access to equipment, access to competitions and even for their social acceptance.<sup>230</sup> Extending the proposed, Benedet and Grant abuse of trust, presumption to include elite athletes would require courts to examine whether a trust relationship and power imbalance was used by the coach to satisfy his or her sexual objectives. The relationship would also be considered from the perspective of the athlete.

Benedet and Grant state that women with mental disabilities experience more sexual assaults than other women because of the “gendered imbalance of power,” and that these individuals are often dependent, segregated, socially isolated and have limited resources.<sup>231</sup> Benedet and Grant also suggest that the unusually high rates of sexual assault for women with disabilities could be further perpetuated by offenders’ lack of fear of prosecution.<sup>232</sup> Many women with mental disabilities are regularly subjected to controlling behaviour from the people around them, such as caregivers, doctors, and therapists. This may have the effect of making these women more likely to be acquiescent and they may find that being non-confrontational promotes inclusion in desirable social situations.<sup>233</sup>

Elite athletes are an increased risk of sexual harassment and maltreatment<sup>234</sup> from a similar group of individuals: doctors, technicians and coaches.<sup>235</sup> The powerlessness of athletes to stand up to this behaviour results partly from the close relationship and power

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<sup>230</sup> Brackenridge, *supra* note 90.

<sup>231</sup> Benedet, *supra* note 224 at 257.

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

<sup>233</sup> *Ibid* at 257.

<sup>234</sup> Brackenridge, *supra* note 90 at 95.

<sup>235</sup> *Ibid.*

imbalance in these relationships, but also, in a large part, from gender imbalance in sport.<sup>236</sup> As Brackenridge puts it,

Sexual exploitation in sport, then, is rooted not so much in the methods by which sport is praised as in the gendered constitution of sport itself. In other words the high tolerance for sexual exploitation in sport (which is evident in some sports more than others) is a product of the gender order of sport.<sup>237</sup>

In addition to being dependent on coaches, athletes frequently live and train in segregated conditions. Isolation is reported to be a significant contributing factor for athlete sexual abuse.<sup>238</sup> Athletes may experience social and familial isolation resulting from frequent and intense training or competitive conditions as well as travel demands, and some coaches may intentionally create this sense of isolation as part of a grooming process.

He secluded us a lot from the rest. We didn't stay in hotels. We went to Europe for a two month period and he rented a house... We were 'saving money for the team'. - Athlete Five

It is kind of extreme. We are forced to live away from home all year. [Other athletes] do not have the same isolation. - Athlete Eight

Just as is the case for women with disabilities, sexual abuse and athlete maltreatment of all kinds is likely to increase if perpetrators have a sense of invincibility and lack of fear of complaints, investigations or prosecution.<sup>239</sup> Elite athletes, like women with mental

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<sup>236</sup> *Ibid.*

<sup>237</sup> *Ibid* at 238.

<sup>238</sup> *Ibid* at 119; Roberts, *supra* note 74 at 2.

<sup>239</sup> Neil Malamuth and Karol Dean, "Attraction to Sexual Aggression" in A Parrot and L Bechhofer, eds, *Acquaintance Rape: The Hidden Crime* (New York: Wiley 1991) at 229.

and physical disabilities, are trained to be compliant, since being deferential and following orders is usually considered part of the role of being an elite athlete.<sup>240</sup>

For the most part athletes are very deferent. We always, you know, the coach tells you to do this, we do this. So when your governing body or your administrators say you are going to this competition and it costs \$10,000 you say, 'okay'. Like there is not a lot of questioning when you are an athlete. Usually you are looking internally a lot. So I think that athletes don't know how to advocate for themselves. It is not something they inherently think to do. It is not like an instinct; instead it is to listen to whoever is giving the orders. -Athlete Eleven

Creating a breach of trust presumption for elite athletes under Section 273.1(2)(c), such as Benedet and Grant propose for women with disabilities, could greatly benefit athlete victims who are over eighteen. This presumption should be worded so that all elite athletes are presumed to be in a trust relationship with their coaches and other medical staff or technicians who may have power over them, and the burden should be on the accused to prove this is not so. The presumption would result in coaches being held to a higher standard, and this higher standard is one that is in keeping with the professional responsibility they have assumed and the level of trust they have received.

Adult coaches and athletes wishing to enter into a consensual sexual relationship should be required to do so outside of their sport. This would require that one of them officially resigns from their position and leaves the sport organization. A solution that some elite athlete-coach couples have resorted to is to become a private coach-athlete team that is no

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<sup>240</sup> Brackenridge, *supra* note 90 at 110.

longer governed by organizational regulations.<sup>241</sup> This decision is likely to only be available to the most successful athletes however, because little funding or support will be available to the independent athlete through the organization and the athlete will still need approval from the national sport organization to enter international competitions representing Canada.

The length and scope of this thesis prevents me from exploring other possible *Criminal Code* changes and adaptations for the protection of athletes from maltreatment and sexual abuse. It is important to note however, that the criminal justice system frequently provides an unsatisfactory response to athlete maltreatment. In the Charest case,<sup>242</sup> there was grooming, sexual harassment, sexual touching, and repeated sexual exploitation over many years, both with underage athletes and with athletes over eighteen. The personal consequences for the athletes were devastating, and yet twelve of them found the courage to participate in the criminal process that eventually led to his conviction.

Unfortunately for those individuals, what ensued was four years of turmoil, emotional hardship, uncertainty and re-traumatization. Some of the trial witnesses feel that being involved in the process may have helped them with closure, and it created an informal support system for some of them. All firmly believe it was necessary to come forward in order to protect other young athletes from a similar fate. Apart from these benefits, the drawn-out trial and sentencing of Charest provided survivors with little opportunity for healing or restitution.

He was arrested in March 2015 and he has been in jail ever since. After years of constant delays and him changing lawyers six times, he was sentenced to 12 years in December 2017, but they deduct 1.5 for the time he spent in jail already. It's indeed a little

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<sup>241</sup> Randy Starkman, "Heil Finds Love Among the Moguls" *The Star* (14 Feb 2010). See *R. v. D.C.*, (2020 CarswellOnt) 3673), a 19 year old track coach began a sexual relationship with a 14 year old athlete. They were married at 18 years and 23 years of age, respectively. The relationship turned into one of abuse and control and the coach was eventually convicted of sexual assault, assault causing bodily harm and assault.

<sup>242</sup> *Charest c R*, 2017 QCCA 2048 (CanLII).

discouraging... And now he is appealing in June 2019 and his sentence will most likely be reduced. It makes me cry. - Athlete Three

The criminal system is often lengthy and emotionally exhausting. It places the highest possible burdens of proof on the prosecution, which means in many cases that the accused may eventually be acquitted because evidence is unusable, inconsistent, out of jurisdiction, or otherwise unreliable, and charges cannot be proven beyond a reasonable doubt. When an accused is convicted and sent to prison, this prevents further offences by that individual for a designated period of time, as the perpetrator has been removed from society. It does not mean however, that he or she is rehabilitated, and most problematically, it does not address any underlying social or cultural issues that may have allowed the crime to take place, and it may leave complainants with surprisingly little personal satisfaction.

#### **6.5.5 Independent International or National Regulatory Authority**

The Lawn Tennis Association of Great Britain commissioned an independent inquiry to look into their procedural practices, after the highly publicized sexual abuse conviction of a Welsh tennis coach in 2017.<sup>243</sup> The inquiry revealed the response of the tennis club had failed to address athlete complaints, had not referred complaints to the national authority and had engaged in internal investigations.<sup>244</sup> This list of procedural abuses mirrors the

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<sup>243</sup> Joseph Bryan, “Key Points from the Quinlan Report into Safeguarding at the Lawn Tennis Association”, *Law in Sport* (15 Feb 2019), online: <<https://www.lawinsport.com/topics/articles/item/key-points-fr...inlan-report-into-safeguarding-at-the-lawn-tennis-association>>.

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

experiences of Mary Cain,<sup>245</sup> and the Nassar,<sup>246</sup> Bennell<sup>247</sup> and Charest victims,<sup>248</sup> as well as reflecting the personal accounts of procedural failures shared by many athlete respondents.

Athlete respondents frequently emphasized the necessity for creating an independent body to which athletes can report with guaranteed anonymity and where coaches and athletes can receive fair and impartial hearings.

I really think there needs to be an independent body that is separate, that you feel like, if I don't want this getting back to the sports organization they can privately investigate this person.... There cannot be someone in [National Sport Organization] who is involved in the sexual harassment investigation. It has to be an independent body. - Athlete Two

Personally I think there needs to be a third party that is available or that is overseeing these kinds of topics or problems, I really do. Because federations all they care about is performance. - Athlete Five

Every story in the last 12 months, including my own, shows that athletes are willing to step forward, take a risk and make a

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<sup>245</sup> Mary Cain, "I Was the Fastest Girl in America Until I Joined Nike" *The New York Times* (7 Nov 2019), online :< <https://www.nytimes.com/2019/11/07/opinion/nike-running-mary-cain.html>>. Note: Mary Cain's complaint against Nike and the Oregon project was internally investigated because Nike would not consent to a third party investigation.

<sup>246</sup> Margo Mountjoy, "'Only by Speaking Out Can We Create Lasting Change': What Can We Learn From the Dr Larry Nassar Tragedy?" (2019) 53:1 *British J Sports Med* 57.

<sup>247</sup> Jamie Jackson, "Former Football Coach Barry Bennell Charged With Nine Sexual Offences" *The Guardian* (18 May 2020), online: <<https://www.theguardian.com/football/2020/may/18/former-football-coach-barry-bennell-charged-with-nine-sexual-offences>>.

<sup>248</sup> Charest, *supra* note 242.



complaint but the infrastructure is letting them down. - Parent  
Two

We [athletes] are so vulnerable.... I think [an independent  
authority] is something that is desperately needed.... One of the  
last places you want to turn is to the people [in your sport  
organization] that have disappointed you. - Athlete Eleven

Kerr has also called for an international independent neutral body to oversee athlete maltreatment.<sup>249</sup> She suggests that such an organization could employ strategies similar to those implemented by the World Anti-Doping Agency (WADA), which depends on a constant sharing of small amounts of information.<sup>250</sup> Since it is impossible to check on the workings of every organization every day, it is suggested that a better option is to collect observations from many sources, combined with irregular monitoring, thus producing a package of information which may be more useful, and more accurate, than one intensive investigation.<sup>251</sup>

A maltreatment prevention centre engaging in such methods might compile information such as: training observations, unusual employment patterns,<sup>252</sup> repeated suspicious behaviours and complaints. The centre would also engage in data collection, policy creation, and sharing education.<sup>253</sup>

Since it is essential to establish maltreatment definitions,<sup>254</sup> an online international educational strategy could be used to share these. An independent helpline should also be

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<sup>249</sup> Kerr, *supra* note 7 at 754.

<sup>250</sup> Kerr, *supra* note 2 at 101.

<sup>251</sup> *Ibid.*

<sup>252</sup> F Jacobs, F Smits & A Knoppers, ““You Don’t Realize What You See!”: The Institutional Context of Emotional Abuse in Elite Youth Sport” (2017) 20:1 Sport in Society 126.

<sup>253</sup> Kerr, *supra* note 2 at 6.

<sup>254</sup> *Ibid.*

established.<sup>255</sup> (Helpline effectiveness has been scientifically proven.)<sup>256</sup> Any and all reports of maltreatment must be investigated. The international body appointed to govern the organization would create an accountability system, with clear sanctions for breaches. Athletic coaches and managers should be accountable to the international organization, and the international governing body should be accountable to athletes.<sup>257</sup>

Kerr's ambitions for an international maltreatment prevention centre are not likely to be realized in the near future, and they are unlikely to be fulfilled by either the Court of Arbitration for Sport, or the Centre for Sport and Human Rights. Practically speaking it is unlikely that either organization will have the ability to significantly impact the maltreatment issues of individual athletes the world over. In order for a solution to be successful it has to be accessible to athletes and practical to use. It remains to be seen if there will be a way, for financially-restricted athletes in small local clubs in distant parts of the world, to access the justice that has been promised by the Centre for Sport and Human Rights.

In the meantime, the most promising option is the creation of an independent Canadian sport authority supported by the federal government and the national sport federations. This could effectively be the Canadian version of the US Centre for Safe Sport, but without any potentially compromising ties to the Canadian Olympic Committee. The two biggest problems with this solution will be firstly, convincing organizations, such as the Coaches Association of Canada and the national sport federations, to give up their current hold on safe sport measures. Secondly, in a country with a small population like that of Canada it could be difficult to find sufficient independent funding to make sure that the authority is able to provide all of the necessary services and supports in a professional manner.

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<sup>255</sup> *Ibid*; Tine Vertommen et al, "Interpersonal Violence Against Children in Sport in the Netherlands and Belgium" (2016) 51 Child Abuse & Neglect 223.

<sup>256</sup> Tine Vertommen et al, "Sexual Harassment and Abuse in Sport: The NOC\* NSF Helpline" (2015) 50:7 Int Rev Soc of Sport 822.

<sup>257</sup> Kerr, *supra* note 2 at 101.

It is now understood that maltreatment of athletes is not an individual issue but part of a larger systemic and historic problem. It impacts athletes in every sport and at every level of sport. Solutions must aim to educate and but also to change sport culture. Policies and programs must be evidence based, multifaceted, multi-layered, collaborative, user-friendly and highly accessible to all who might need these services.

### 6.5.6 Athlete Voice

The natural athlete-coach power imbalance leads to an inherent and unavoidable vulnerability, particularly for elite athletes.<sup>258</sup> Athlete education and empowerment may help to decrease this imbalance. One means of athlete empowerment, that is currently gaining momentum, is through athletes' organizations established to protect the rights of members.<sup>259</sup> For over two decades, Canadian national team athletes have benefitted from representation by the athlete-centred, and athlete run organization, AthletesCAN.<sup>260</sup>

At the international level, Global Athlete is an international athlete-led organization.<sup>261</sup> Canadian, Benoit Huot, is a para Olympic swimmer and representative of Global Athlete. He says that amateur sport is not in fact amateur, but a billion dollar business in which athletes cannot be paid for appearances or receive prize money for their top finishes. This discrepancy has become a huge issue at the American National Collegiate Athletic Association (NCAA) level where highly-paid coaching jobs and event ticket sales are

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<sup>258</sup> Kerr, *supra* note 7 at 754.

<sup>259</sup> "Amateur Athletes Deserve a Say in How Competitions are Run, says Benoit Huot: Athlete-Led Advocacy Group Global Athlete, Led By Canadian Rob Koehler, Launched in February" *The Current CBC* (01 Mar 2019), online: <<https://www.cbc.ca/radio/thecurrent/the-current-for-march-1-2019-1.5038651/amateur-athletes-deserve-a-say-in-how-competitions-are-run-says-benoit-huot-1.5038654>>.

<sup>260</sup> Athletescan, online: [athletescan.com](https://athletescan.com/en) <<https://athletescan.com/en>>.

<sup>261</sup> Doug Harrison, "New Athlete-Led Movement Aims to Drive Change Across the Sporting World" *CBC Sports* (13 Feb 2019), online: <<https://www.cbc.ca/sports/olympics/global-athlete-movement-koehler-skinner-1.5016446>>.

part of a billion dollar university athletic business and yet until recently, none of the proceeds were shared with athletes.<sup>262</sup>

Global Athlete Director General, Canadian Rob Koehler, recalls that Canadian lawyer and former president of the World Anti-Doping Agency (WADA), Dick Pound, once told him: "There's only one thing that's going to change the face of sport and make people listen... and [be] accountable, and that's when athletes get together."<sup>263</sup> The founders of Global Athlete believe that an athlete led organization is needed because the IOC and the IOC's Athletes' Commission do not always prioritize athletes' best interests.<sup>264</sup> Olympic cycling champion, Callum Skinner says that the IOC Athletes' Commission does not adequately represent athletes because it is really just an extension of the IOC, and that the IOC and the IOC Athletes' Commission have been known to put IOC goals ahead of those of athletes.<sup>265</sup>

Koehler is pushing for more athlete involvement in scheduling at international competitions, and more input on sport classifications, as well as an end to the amateur and professional sport classifications.<sup>266</sup> Global Athlete also recognizes the need for a strong athlete voice on athlete maltreatment and on doping.<sup>267</sup> In the United States, August Wolf is challenging the US Olympic Committee through his organization, Olympians Rising. His goal is to address alleged negligence on the part of the US

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<sup>262</sup> "Law Forces NCAA to Let Some Athletes Finally Get Paid, *Front Burner*, CBC, (2 Oct 2019), online: <<https://www.cbc.ca/radio/frontburner/law-forces-ncaa-to-let-some-athletes-finally-get-paid-1.5304877>>.

<sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid.*; Barry Svrluga, "For Tokyo 2020, the IOC is Weighing Many Factors. Are Athletes One of Them?", *Washington Post* (18 March 2020), online: <<https://www.washingtonpost.com/sports/2020/03/18/tokyo-2020-ioc-is-weighing-many-factors-are-athletes-one-them/>>.

<sup>265</sup> Liam Morgan, "Global Athlete Criticised by IOC Athletes' Commission as Koehler Insists Organisation is Not a Threat to Existing Bodies", *Inside the Games* (14 February 2019), online : <<https://www.insidethegames.biz/articles/1075526/global-athlete-criticised-by-ioc-athletes-commission-as-koehler-insists-organisation-is-not-a-threat-to-existing-bodies>>.

<sup>266</sup> Global Athlete, online: [globalathlete.org](https://globalathlete.org) <<https://globalathlete.org>>.

<sup>267</sup> *Ibid.*

Olympic Committee.<sup>268</sup> One of Wolf's primary grievances is that he says less than ten percent of the annual income of the United States Olympic Committee is actually spent on athletes.<sup>269</sup>

An international athletes' organization or union could provide an important voice for athletes like Shim Suk-hee, the South Korean speed skater who was allegedly beaten by her coach in 2018.<sup>270</sup> It could provide education and representation on maltreatment, doping, financial matters, human trafficking and athlete rights. Since AthletesCAN only pertains to Canadian National team athletes and Olympians Rising exclusively represents American Olympians, perhaps the newly founded, Global Athlete will step up to fill this role. The power of AthletesCAN is somewhat limited by a small Canadian population, financial constraints, and the inherent vulnerability of national team athletes who are still trying to achieve their international and Olympic goals. However, if the more powerful, and independent organizations, like those led by Wolf and Koehler, appear to be prioritizing financial, categorization and scheduling issues, then who will champion the cause of athlete wellbeing?

### 6.5.7 Codes of Conduct

The Council of Europe developed a *European Sports Charter* in 1992,<sup>271</sup> and created a Code of Sports Ethics in 2010, with goals of: participation, inclusion, safety, excellence, ethical delivery of sport and freedom from drug use and sexual abuse.<sup>272</sup>

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<sup>268</sup> Olympians Rising, online: [olympiansrising.org <https://www.olympiansrising.org/about>](https://www.olympiansrising.org/about).

<sup>269</sup> Kayla Harrison & August L Wolf "Larry Nassar Wasn't the Only Abuser in Olympic Sports" *Washington Post* (5 April 2018), online: [https://www.washingtonpost.com/opinions/larry-nassar-wasnt-the-only-abuser-in-olympic-sports/2018/04/05/1bfd994-3809-11e8-8fd2-49fe3c675a89\\_story.html](https://www.washingtonpost.com/opinions/larry-nassar-wasnt-the-only-abuser-in-olympic-sports/2018/04/05/1bfd994-3809-11e8-8fd2-49fe3c675a89_story.html).

<sup>270</sup> *supra* note 199.

<sup>271</sup> Council of Europe, "European Sports Charter", online: <https://www.coe.int/en/web/sport/european-sports-charter>.

<sup>272</sup> Council of Europe, online: <https://rm.coe.int/16805cecaa>.

The creation of codes of conduct for coaches, athletes and parents<sup>273</sup> have long been popular approaches (although it has been noted that codes of conduct introduced at the national level are not always adopted at local and club levels).<sup>274</sup> Sport contracts, for athletes, coaches and parents are also sometimes used in an attempt promote engagement, awareness and responsible behaviour.<sup>275</sup>

In Canada, recent progress was made with the engagement of the Canadian Centre for Ethics in Sport (CCES) in the creation of a Universal Code of Conduct to Prevent and Address Maltreatment in Sport (UCCMS).<sup>276</sup> A draft has been produced which contains a consensus statement, maltreatment definitions, duties to report and sanctions for breaches. CCES is now in the process of leading an expert consultation process and receiving feedback from the sport community.<sup>277</sup>

The goal is to create a single universal code of conduct for all levels of Canadian sport. The UCCMS provides universal maltreatment definitions, and will create awareness about athlete maltreatment. The working group intends to identify an independent body to implement the UCCMS and impose sanctions. The UCCMS currently prohibits sexual relations between national team coaches and athletes. This is proposed as a first step toward banning sexual relationships where there is a power imbalance between athletes and authority figures in sport.<sup>278</sup> The UCCMS has already been embraced by many national sport federations and is an important step toward creating national safe sport policy in Canada.

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<sup>273</sup> Brackenridge, *supra* note 90 at 189; Kerr *supra* note 2; Canadian Centre for Child Protection (2018) Programs and initiatives, online: <<https://www.protectchildren.ca/en/programs-and-initiatives/Google Scholar>>.

<sup>274</sup> Parent, *supra* note 73 at 128.

<sup>275</sup> Brackenridge, *supra* note 90 at 218.

<sup>276</sup> Canadian Centre for Ethics in Sport, Universal Code of Conduct to Prevent and Address Maltreatment in Sport, online: <<https://www.tribc.org/wp-content/uploads/2020/01/UCCMS-v5.1-FINAL-Eng.pdf>>.

<sup>277</sup> “CCES Leading Development of Draft Universal Safe Sport Code”, *Canadian Centre for Ethics in Sport* (June 20, 2019), online: <<https://cces.ca/news/cces-leading-development-draft-universal-safe-sport-code>>.

<sup>278</sup> *Ibid.*

### 6.5.8 Education

Educational programs for athletes, coaches and parents have evolved considerably over the last twenty some years. The Coaching Association of Canada (CAC) has a “Make Ethical Decisions” module, which is designed to assist coaches facing ethical challenges.<sup>279</sup> The CAC has also partnered, with Sheldon Kennedy’s Respect Group, to offer educational online training modules for coaches and parents.<sup>280</sup>

Educational programmes like these usually aim to train coaches, athletes and parents to recognize maltreatment and to provide steps for reporting and intervention.<sup>281</sup> They may be failing to meet their goals in several areas however. Maltreatment definitions are still not consistently used,<sup>282</sup> (although in Canada they have recently been defined in the UCCMS). Sexual assault definitions used in these programs frequently suggest that offences primarily occur between an adult coach and a minor, rather than identifying the importance of the coach-athlete power imbalance and trust relationship, and recognizing that sexual abuse can also occur between two adults, or between peer athletes, particularly if one of them has significant power over the other.<sup>283</sup>

Modules have tended to focus on identifying and changing individual behaviours, rather than recognizing the importance of moving toward a holistic approach to coaching and working to change sport culture.<sup>284</sup> In addition to these content issues, the success of online training modules may depend on delivery of material, ease of use, and the level of commitment of the individual taking the module.

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<sup>279</sup> Coaching Association of Canada, *supra* note 1.

<sup>280</sup> Respect Group, *Respect in Sport* (2018), online: <<http://respectgroupinc.com/respect-in-sport/Google Scholar>>.

<sup>281</sup> Kerr, *supra* note 2.

<sup>282</sup> Kerr, *supra* note 7 at 751.

<sup>283</sup> *Ibid* at 748-750.

<sup>284</sup> *Ibid* at 752.

"I have seen our coaches taking it [ethics course] and it loos like they just sit there and listen... I know I will take it seriously. I think the other girls probably will too because then we will all know [what our rights are], but I am not sure about the coaches." - Athlete Eight

Online safe sport education modules are potentially helpful in increasing awareness and understanding of athlete maltreatment issues, but for the most part, the available programs have not been scientifically evaluated and are not monitored by an objective outside entity.<sup>285</sup> Content tends to focus on sexual abuse, while often ignoring other forms of athlete maltreatment, such as physical maltreatment and neglect.<sup>286</sup>

Proponents of athlete maltreatment education argue that it is important to empower youth to be active in their health and safety, while others are critical of this approach, believing that it places too much responsibility on potential victims to recognize and report maltreatment, and in effect, blames the victim if they do not step up.<sup>287</sup> Most importantly, it should be acknowledged that many athlete respondents have taken responsibility for speaking out in the past. Numerous athlete maltreatment survivors, in the Nassar<sup>288</sup> and Bennell cases,<sup>289</sup> among countless others, did repeatedly report their abuse to authorities, but for many years, nothing was done.<sup>290</sup>

Efforts are being duplicated by public and private, for profit and not for profit, each of which may have a different focus which may impact the content and delivery of the

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<sup>285</sup> *Ibid.*

<sup>286</sup> Kerr, *supra* note 2 at 97; Kerr, *supra* note 7 at 751.

<sup>287</sup> *Ibid* at 96.

<sup>288</sup> Mountjoy, *supra* note 246.

<sup>289</sup> Jackson, *supra* note 247.

<sup>290</sup> Kerr, *supra* note 2 at 96.



product.<sup>291</sup> This can also lead to vast amounts of wasted resource and inconsistent education and prevention initiatives.<sup>292</sup>

## **6.6 Conclusions:**

Effective Canadian safe sport measures must begin with a clear stated vision. Straightforward definitions need to be established and consistently stated. These two steps have now been taken on by CCES with the introduction of the UCCMS. The next step is to create policy and sanctions that are comprehensive, cohesive and acceptable to stakeholders. Legislative and policy language and penalties must not be so general as to allow for overly flexible interpretation. Educational strategies should be evidence based, monitored, evaluated regularly, and they must be consistently offered in an ongoing manner. Individuals whose job it is to respond to maltreatment complaints will require clear protocol, proper professional training and sufficient financial support. In order to change longstanding ideologies, for education to have an impact, and for policy to be effectively implemented, the new vision and policy must be embraced by Canadian sport organizations.<sup>293</sup> This will only be possible with a clear mission and strong leadership.<sup>294</sup>

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<sup>291</sup> Rhind, *supra* note 9 at 151.

<sup>292</sup> Kerr, *supra* 7 at 752.

<sup>293</sup> *Ibid.*

<sup>294</sup> Parent, *supra* note 73 at 125.

## CHAPTER SEVEN - CONCLUSION

This thesis considered law and policy, academic literature and most importantly, the direct voices of athletes, in looking at the causes and impacts of athlete maltreatment, as well as potential options for prevention and redress. The devastating harms caused by athlete maltreatment are indisputable. Fortunately, many athletes and academics are united in a mission to promote a new vision of sport that focuses on the health and wellbeing of athletes rather than on athletic victories.

Changing sport culture will not be an easy task. The elite sport belief system that values medals above everything else has been embraced by athletes, coaches, sport administrators, sponsors and sports fans for so long that it is difficult to imagine sport any other way. The win-at-all-costs message is one that may be felt most strongly by elite athletes, but the message is clearly heard by athletes at all sport levels the world over. American world-champion ski racer, Lindsey Vonn retired in 2019 at age 34, stating that her high speed crashes, surgeries and expectation of significant longterm physical disabilities, were simply the price she paid for her athletic success.<sup>1</sup>

I have never wanted the storyline of my career to be about injuries... [My injuries were] much more painful than I let on, but I continued to race because I wanted to win a medal in the Olympics for my late grandfather.... My body is broken beyond repair.... My body is screaming at me to STOP and it's time for me to listen. At this point, arthritis is the least of my worries and I hope I can still ski with my kids some day. But even knowing what lies ahead for my body, it has still been worth it.<sup>2</sup>

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<sup>1</sup> Lindsey Vonn (1 Feb 2019) [Facebook update], online:  
<<https://www.facebook.com/89975379727/posts/the-past-two-weeks-have-been-some-of-the-most-emotionally-challenging-days-of-my/10157243499909728/>>.

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

Vonn's statement was celebrated for its bravery and candour, but perhaps repeatedly competing while injured and placing the winning of medals above one's health is not an entirely wise or responsible message for a national hero to share with young athletes and fans.

It is important to recognize that not all athletes fare as well as Vonn, who retired with debilitating injuries, but also with fame and wealth. American gymnast, Julissa Gomez died at age 18, in 1991. She broke her neck doing a risky vault, while competing with a pre-existing injury.<sup>3</sup> Christy Henrich died at age 21, in 1994, after battling a severe eating disorder associated with her elite gymnastics career.<sup>4</sup> Nikola Zoricic was a top-ranked Canadian ski cross competitor who died in 2012, following a crash which has been blamed on an unnecessarily dangerous racing course.<sup>5</sup> American long distance runner, Mary Cain, engaged in self-harm and became suicidal after being pushed to her mental and physical limits by her internationally-revered coach.<sup>6</sup> Following the recent Nassar trial for the sexual abuse of hundreds of American gymnasts, British gymnasts have now come forward about physical, psychological and nutritional abuse on their national and Olympic teams.<sup>7</sup> Sometimes athletic achievement clearly comes with too high a personal price

I have been angry about it for so long, for 20 years. And he ruined my life for a chunk of time and he ruined my dream of

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<sup>3</sup> Joan Ryan, *Little Girls in Pretty Boxes: The Making and Breaking of Elite Gymnasts and Figure Skaters* (New York: Warner Books, 1996) at 53 and 95.

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

<sup>5</sup> "Nik Zoricic Family Feels Vindicated by FIS Findings: Late Skier Found Not at Fault for Fatal Crash" *The Canadian Press, CBC Sports* (10 Mar 2014) online: <<https://www.cbc.ca/sports/olympics/winter/skiing/nik-zoricic-family-feels-vindicated-by-fis-findings-1.2567048>>.

<sup>6</sup> Mary Cain, "I Was the Fastest Girl in America Until I Joined Nike" *The New York Times* (7 Nov 2019), online :< <https://www.nytimes.com/2019/11/07/opinion/nike-running-mary-cain.html>>.

<sup>7</sup> Sean Ingle, "British Gymnastics to Investigate Alleged Abuse of Elite Athletes: Independent Inquiry to Examine 'Shocking' Claims of Physical and Emotional Abuse" *The Guardian* (7 Jul 2020).

[international competition] which is something I will never get back and never forgive him for. - Athlete Two

I did not trust anyone, I felt extremely depressed, suicidal, alone, had to go on medication. I had anorexia.... I wanted to not feel anymore. Short term, I just started to hate myself. It took me years and years and I am still working on it.- Athlete Seven

There is a lot of bad stuff you kind of just have to deal with to make it to the top but... there is a line and that line has been crossed way too many times! - Becky Downie, UK Gymnastics, World Silver Medalist 2019<sup>8</sup>

Unlike Vonn, who made a conscious choice to continue competing in spite of the physical cost, most athletes do not have Vonn's elevated status and power, and they often have little say in training and competition decisions that can sometimes have serious longterm consequences. Should it have been up to Zoricic to look for compromised course safety measures before his event? Should sixteen year old Gomez have told her coach that she was too injured to take on the difficult vault he had called for? Extreme coaching demands, dietary restrictions, training through injury, physical and psychological maltreatment and neglect, and even sexual abuse, can all become normal and accepted parts of an athlete's sport experience.<sup>9</sup> In spite of a growing body of evidence documenting maltreatment harms to athletes, so long as the focus of elite sport rests primarily on results, successful coaches and questionable coaching methods are likely to remain unchallenged.<sup>10</sup>

Questionable coaching methods, and all forms of athlete maltreatment, can also be the result of systemic issues, such as masculine hegemony, athlete sexualization, or a long

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<sup>8</sup> *Ibid.*

<sup>9</sup> Ashley Stirling & Gretchen Kerr. "Abused Athletes' Perceptions of the Coach-Athlete Relationship" (2009) 12:2 *Sport in Society* 227 at 229.

<sup>10</sup> *Ibid* at 232.

standing belief system that endorses yelling at athletes. It is often in these unchecked toxic environments that one coach offender after another will engage in maltreatment behaviours. Safe sport measures must therefore start by focusing on education and prevention.<sup>11</sup> This will only be possible if sport organizations are willing to work to identify and address the root causes of maltreatment in sport within their own clubs and organizations.

Meaningful change will also require an overhaul of the current internal sport dispute resolution process. Athletes need an independent authority to which they can safely report and which will be responsible for oversight of sport organizations as well as complaint investigations and resolution of disputes. Sport organizations must endorse clearly written safe sport policy and procedure, and maltreatment education must be ongoing, consistent and evidence-based.

Other important measures could involve professional training for those working in maltreatment investigations, public sharing of information on banned coaches, immediate response to allegations of maltreatment, penalties that reinforce zero tolerance, and strong leadership that shows the way by embracing athlete wellbeing as the primary sport priority, and inviting athletes to engage in the decisions that affect their athletic careers and their lives

The safe sport literature reinforces the fact that being reactive and punitive, and focusing attention on individual offenders does not lead to successful prevention outcomes. The full spectrum of maltreatment behaviours must be acknowledged,<sup>12</sup> and it must be understood that maltreatment does not have to be criminal or sexual in nature in order to

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<sup>11</sup> Katherine Hampel, “Whose Fault is it Anyway? How Sexual Abuse Has Plagued the United States Olympic Movement and Its Athletes” (2019) 29:2 *Marquette Sports L Rev* 547.

<sup>12</sup> Julie Novkov, “Law, Policy, and Sexual Abuse in the #MeToo Movement: USA Gymnastics and the Agency of Minor Athletes” (2019) 40:1 *J Women Politics & Policy* 42.

be worthy of redress.<sup>13</sup> It must be understood that maltreatment is a sport-wide issue, not a female athlete/male coach issue and not a sexual issue.<sup>14</sup>

Increased public and political awareness on athlete maltreatment has created momentum. That momentum makes this the ideal time to create lasting deep-rooted change from the ground up. Empowering athletes is the first step. The safe sport conversation must begin by focusing on wellbeing rather than harm.<sup>15</sup> Doing so could completely change the tone and substance of the safe sport conversation. This new positive perspective can make it possible for all sport stakeholders to work together for a shared cause of holistic athlete health and sport success and fulfillment. When everyone is respectfully involved in the decision making process, all parties share responsibility<sup>16</sup> for mission outcomes and this can lead to a strong united commitment to healthy sport relationships.

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<sup>13</sup> Hampel, *supra* note 11.

<sup>14</sup> Deborah L Brake, “Going Outside Title IX to Keep Coach-Athlete Relationships in Bounds” (2012) 22:2 *Marquette Sports L Rev* 395.

<sup>15</sup> *Ibid.*

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

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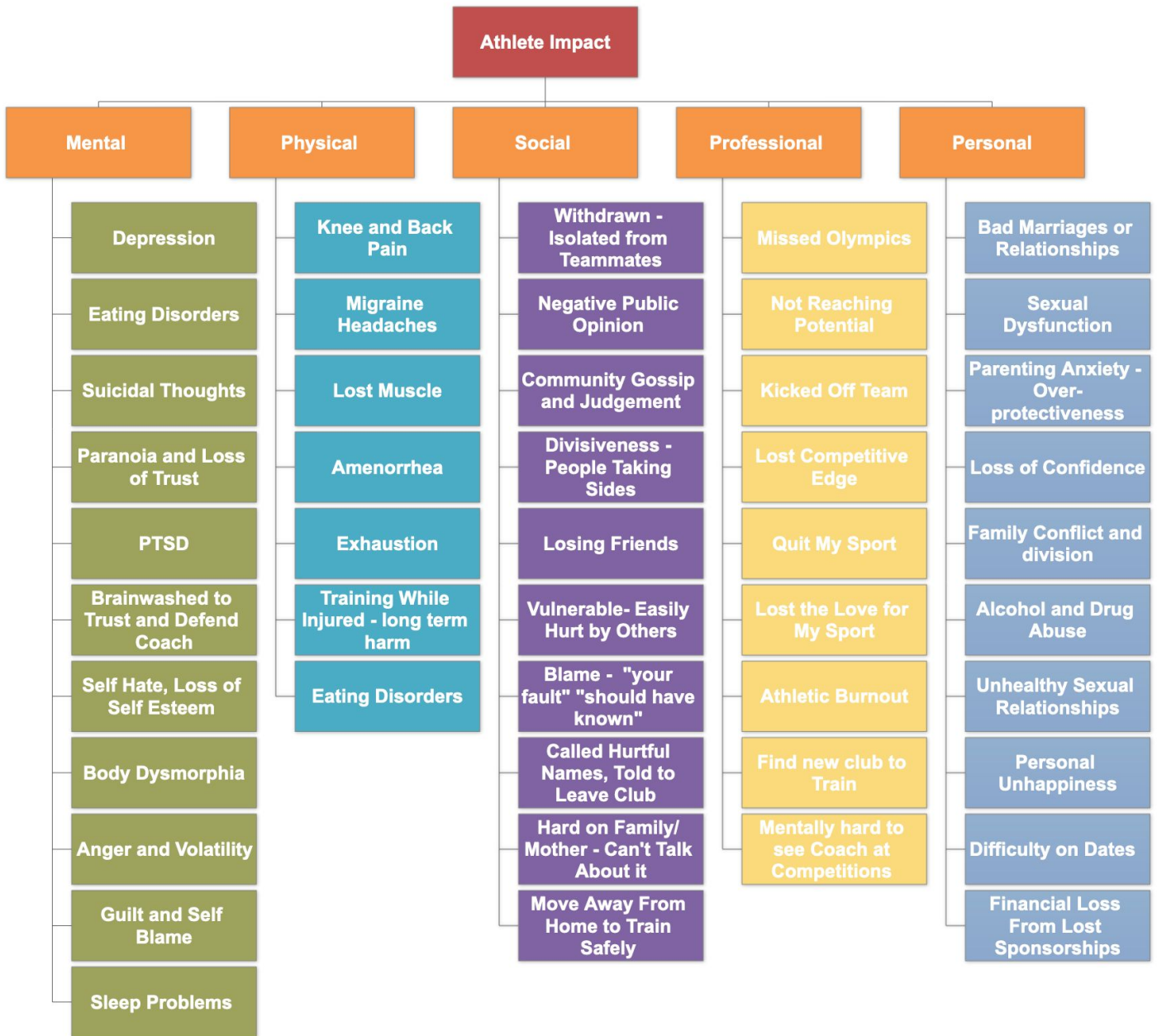
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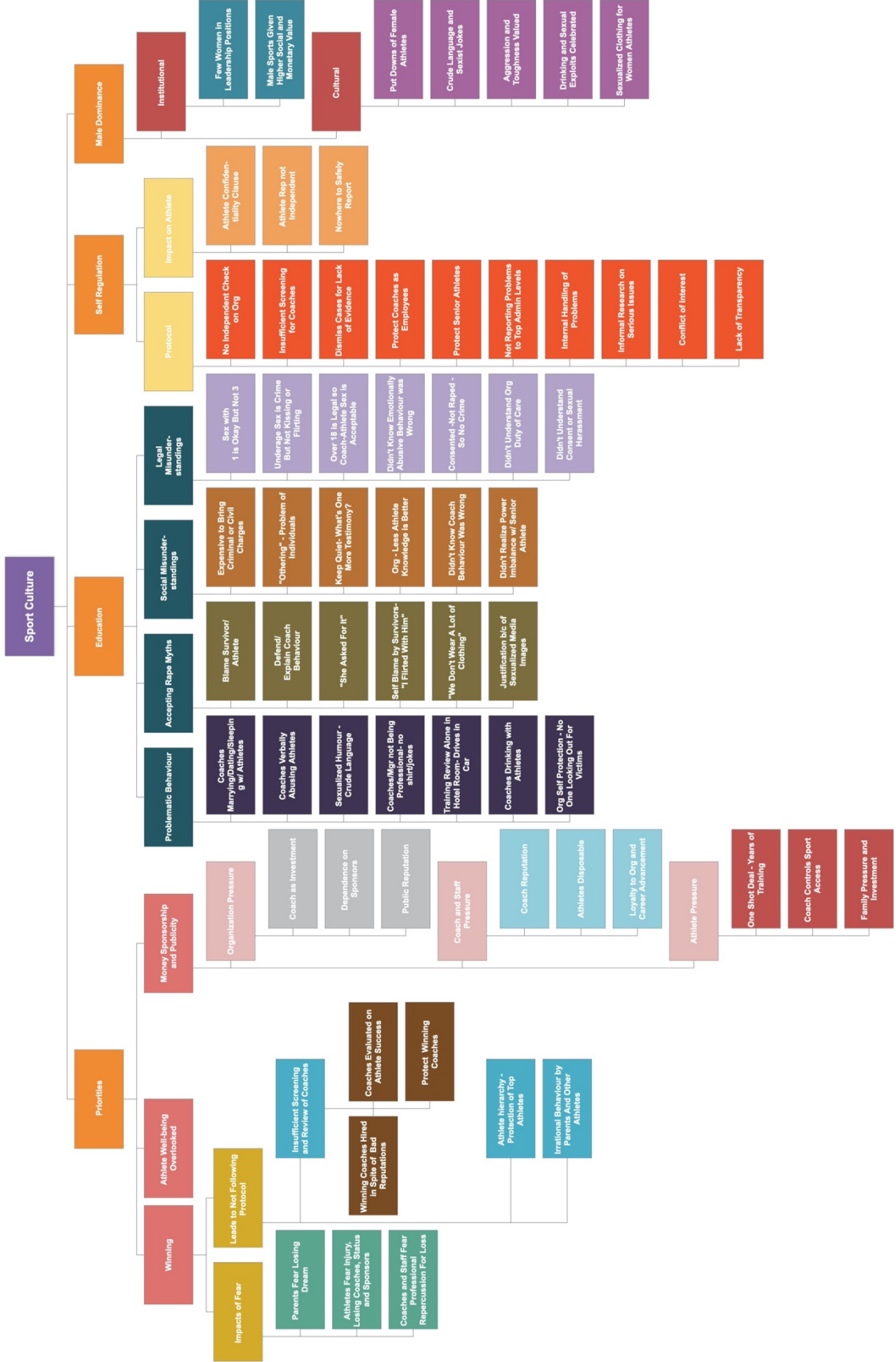
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# APPENDIX A - ATHLETE IMPACTS



# APPENDIX B - SPORT CULTURE





## **APPENDIX C**

### **REQUEST LETTER**

Dear

I would like to invite you to participate in an important research project. An acquaintance of mine, who is a lawyer and a graduate student at Dalhousie University, Schulich School of Law, is doing research on sexual exploitation and sexual harassment of athletes. She has done work in related fields for many years and she is hoping this research will produce important recommendations, from the perspective of the athlete, that will positively impact and protect athletes in the future.

She thinks that In order to find better solutions, we must start with the perspective of the athlete rather than focussing on how to protect sport governing bodies and their coaches. As part of her research she wants to interview athletes, parents of athletes, and others who have worked with athletes and who may have knowledge on this subject because they have witnessed or experienced sexual exploitation by a coach.

If you are interested in speaking with her, she is available to do interviews by Skype or FaceTime. The interview will take about one hour and twenty minutes. You will be given the questions in advance of the interview so that you have time to think about your answers. The interviews will be completely confidential, your name will never be mentioned anywhere and any of your information that is used in the project will be entirely anonymous.

If you think you would be interested in participating in this research, or if you would like more information, have any questions, or would like to see the list of questions you would be asked, you can email her at: [REDACTED] or call or text at: xxx-xxx-xxxx.

Yours,

Wendy MacGregor

Masters in Law Student  
Dalhousie University  
Halifax, NS

## TRANSCRIPTION CONFIDENTIALITY AGREEMENT

This agreement is between:

Wendy MacGregor

Master of Laws student at Dalhousie University, Schulich School of Law

and \_\_\_\_\_

transcriptionist for:

“How can we use existing Canadian law to promote effective prevention, response and remedy in cases of sexual exploitation of athletes in sport?”

REB file # \_\_\_\_\_

Summary of job description/service provision:

I will transcribe, from audio tapes, the exact words spoken by both interviewer and interviewee in recorded one hour long interviews.

I agree to:

1. keep all the research information shared with me confidential. I will not discuss or share the research information with anyone other than with the Researcher(s) or others identified by the Researcher(s).
2. keep all research information secure while it is in my possession.
3. return all research information to the Researcher(s) when I have completed the research tasks or upon request, whichever is earlier.
4. destroy all research information regarding this research project that is not returnable to the Researcher(s) after consulting with the Researcher(s).
5. comply with the instructions of the Researcher(s) about requirements to physically and/or electronically secure records (including password protection, file/folder encryption, and/or use of secure electronic transfer of records through file sharing, use of virtual private networks, etc.).
6. not allow any personally identifiable information to which I have access to be accessible from outside Canada (unless specifically instructed otherwise in writing by the Researcher(s)).

Transcriptionist:

\_\_\_\_\_ (Print Name)

\_\_\_\_\_ (Signature)

\_\_\_\_\_ (Date)

I agree to:

1. Provide detailed direction and instruction on my expectations for maintaining the confidentiality of research information so that the transcriptionist can comply with the above terms.

2. Provide oversight and support to the transcriptionist in ensuring confidentiality is maintained in accordance with the Tri Council Policy Statement Ethical Conduct for Research Involving Humans and consistent with the Dalhousie University Policy on the Ethical Conduct of Research Involving Humans.

Researcher(s):

\_\_\_\_\_ (Print Name)

\_\_\_\_\_ (Signature)

\_\_\_\_\_ (Date)

## **INFORMED CONSENT FORM**

Informed Consent Form for athletes who have experienced or witnessed sexual abuse or sexual exploitation and who are invited to participate in research titled:

**“Using Canadian Law to Prevent, Respond to and Remedy Sexual Abuse in Sport: Listening to and Learning from Athletes”**

Wendy MacGregor

**Principle Investigator/Researcher**

**Master of Laws Student**

Dalhousie University, Schulich School of Law

**Name of Organization**

Lyle Makosky Values and Ethics in Sport Scholarship by the True Sport Foundation.

**Name of Sponsor**

REB file #2017-4262

### **Introduction**

My name is Wendy MacGregor and I am a Master of Laws student at Dalhousie University, Schulich School of Law. I am doing research on sexual exploitation of athletes by coaches in sport. I am going to give you information and invite you to be part of this research. You do not have to decide today whether or not you will participate in the research. Before you decide whether to participate you can talk to anyone you feel comfortable with about the research. If there is anything you do not understand in this consent form, please ask me to go through the information and I will explain. If you have questions before, during or after the interview please feel free to ask them.

### **Purpose of the research**

Sexual exploitation of athletes in sport happens frequently. Protective measures adopted by sports clubs are often designed by lawyers to avoid liability for their coaches and

sports organizations but are not necessarily reflective of the needs of athletes. I believe that getting feedback from former national sports team members and professional athletes, like yourself, will provide essential insights into the functioning of our sport governing bodies with respect to sexual exploitation in sport. The information gained will aid in identifying ways in which our current system fails to meet the needs of athletes and what can be done to address that. Designing protections from the athlete's perspective is the best way to ensure that a responsive, effective system is developed. This study will produce information that could lead to recommendations that will better protect athletes in the future.

### **Type of Research Intervention**

This research will involve your participation in a personal interview that will take about one hour.

### **Participant Selection**

You are being invited to take part in this research because I feel that your experience as an athlete, and your understanding of Canadian sport organizations, can contribute valuable knowledge to this research project.

### **Voluntary Participation**

Your participation is entirely voluntary. If you choose to stop participating at any time during the interview, we will terminate the interview.

### **Procedures**

- a) I am inviting you to participate in this research project. If you accept you will be interviewed privately by me and will be asked to answer questions about sport governing bodies in Canada and their present and past practices with respect to sexual exploitation of athletes by coaches. Your information will remain completely anonymous. You will receive the interview questions in advance so that you have time to consider your answers. The questions will be available in both French and English. You are able to perform your interview in either French

or English. For French interviews I will use a professional translator who has signed a confidentiality agreement.

- b) During the interview I will sit down with you in a comfortable hotel room in Montreal, or if that is not possible I will interview you by Skype. No one else, other than a translator if you require one, will be present unless you would like someone else to be there for support. If you do not wish to answer any of the questions during the interview, I will move on to the next question. The information recorded is completely confidential, and no one else except the translator, the transcriptionist and my thesis supervisor, Dalhousie Law Professor, Elaine Craig, will ever have access to the information recorded during your interview. I will not be sharing any information I receive from you to anyone other than in academic discussions in complete confidence with my research supervisor, except that a draft preliminary data analysis (completely anonymous and de-identified) will be shared with two athletes from a different sport in order to receive current feedback to confirm the accuracy of my analysis.
- c) You will not be identified by name on the recording. The recording will be kept in my personal files on my computer which is password protected and encrypted. The recordings will be destroyed by deleting computer files, wiping from hard drive and shredding hard copies, following approval of my thesis by my examining committee.

### **Duration**

The interviews will take place between March 1 and December 30, 2018. I will plan your interview date with you in advance. You will need ten to fifteen minutes to consider the consent form and questions in advance of the interview. We will take ten minutes to discuss the consent form at the beginning of the interview. The interview will take an additional sixty minutes. There could be a follow up phone call at some point for further clarification, this would take ten to twenty minutes. The total amount of time required from you will be one hour and thirty to forty-five minutes. Participants who wish to give feedback on data once it is collected may choose to participate in a member check by telephone at a later date. This call will likely take an additional 30 minutes. (For athletes

who are only participating at the member check stage, the interview will be in person and will likely take one hour.)

### **Risks**

I am asking you to share personal and confidential information and you may feel uncomfortable speaking about some of the topics. You do not have to answer all questions or continue to take part in the interview if you do not wish to do so. You do not have to give reasons for not responding or for not continuing.

The risk is minimal to moderate that you could experience emotional distress triggered by talking about your past experiences and the challenges you may have faced in finding support and remedy. The probability and magnitude of possible harm is slightly more than in your daily life where you are subjected to media and public discussion of these issues. I will use the utmost care and sensitivity to avoid provoking emotional distress.

I have obtained access to professional psychological counselling that will be available to any participants, like yourself, who may feel distressed by the interview process or by something that is triggered by the interview process. I provide you with toll free numbers to access this counselling. There will be no charge for this service.

Arive (part of Arete Human Resources Inc.) provides professional counselling through a self-referral process. Members have access to 1,600 skilled professionals and clinicians. Services are provided in both French and English. (1 877 412-7483, 1 877 922-8646)

### **Benefits**

There is no obvious direct benefit to you as an individual, but your participation in this study will help me to make recommendations on how to improve our Canadian sport systems for athletes of the future. This will positively impact Canadian sport communities and Canadian society as a whole.

## **Reimbursements**

You will not be provided any financial incentive to take part in the research. I can provide up to \$20 to cover public transit expenses or parking fees.

## **Confidentiality**

This research may draw public attention and if you participate you may be asked questions by people in the media, or your sports community, by virtue of being an athlete associated with the sport that is discussed. I will never refer to you by name at any time and I will not be sharing any information I receive from you to anyone other than in academic discussions in complete confidence with my research supervisor, Professor Elaine Craig. I will not be sharing any information I receive from you with anyone other than in academic discussions in complete confidence with my research supervisor, except that a draft preliminary data analysis (completely anonymous and de-identified) will be shared with two athletes from a different sport in order to receive current feedback to confirm the accuracy of my analysis.

A translator may be used and all audio recordings will be transcribed by a professional transcriptionist. These individuals will come into contact with your interview and they will be required to sign legal contracts that require complete confidentiality. The information collected for this project will remain private. Any information about you will have a number attached to it instead of your name. That information will be protected with a passcode and secure encryption and will not be shared with anyone.

## **Sharing the Results**

Nothing that you tell me will be shared with anyone outside the research team and nothing will be attributed to you by name. The knowledge we get from this research will be shared with you before it is made available to the public. You will receive a summary of the results and a full copy of the final thesis. The results may eventually be published so that other interested individuals may benefit from the research, but your name will not ever be attached to the research.



### **Right to Refuse or Withdraw**

You do not have to take part in this research if you do not wish to do so. You may stop participating in the interview at any time. I will give you the opportunity, following the interview, to review your remarks and you can modify or remove any words or portions that you are not comfortable with. You have twelve weeks, after the interview date, to notify me if you, for any reason, change your mind and would like your information removed from this study.

### **Who to Contact**

You can ask me questions about any part of the research study. If you have any questions you can ask them now or later. If you wish to ask questions later you may call me at:

Wendy MacGregor, xxx-xxx-xxxx

This proposal has been reviewed and approved by the Dalhousie University Research Ethics

Board which is a committee the purpose of which is to make sure research participants are protected from harm. If you wish to find out more about the Dalhousie University Research Ethics Board, you can: phone: 902-494-3423 fax: 902-494-1595 email: [ethics@dal.ca](mailto:ethics@dal.ca).

## **PART II: CERTIFICATE OF CONSENT**

I have been invited to participate in research about sexual exploitation of athletes by coaches in sport. I have read the foregoing information. I have had the opportunity to ask questions about it and any questions I have asked have been answered to my satisfaction. I consent voluntarily to be a participant in this study

\_\_\_\_\_ Print Name of Participant

\_\_\_\_\_ Signature of Participant

\_\_\_\_\_ Date (Day/month/year)

## STATEMENT BY THE RESEARCHER

I have accurately read the above information to the potential participant and to the best of my ability have made sure that the participant understands that the following will be done:

1. All personal information will remain completely confidential and protected.
2. All files containing recorded interviews and identifying information will be destroyed following approval of my thesis by my examining committee.
3. Written transcripts of the interviews will be destroyed on computer and in hard copy following approval of my thesis by my examining committee.
4. Participants will receive a short and long version of the final results of the research.
5. Participation is entirely voluntary and participants may withdraw from the interview at any time.
6. Professional counselling is available if the participant feels any emotional distress associated with the interview.

I confirm that the participant was given an opportunity to ask questions about the study, and all the questions asked by the participant have been answered correctly and to the best of my ability. I confirm that the individual has not been coerced into giving consent, and the consent has been given freely and voluntarily.

A copy of this ICF has been provided to the participant.

\_\_\_\_\_ Print Name of Researcher

\_\_\_\_\_ Signature of Researcher

\_\_\_\_\_ Date (Day/month/year)

## RESEARCH INTERVIEW QUESTIONS:

### Section A: Your Sport Experience

1. What sport did you participate in?
2. When and at what level were you competing?
3. Was your athletic experience mostly a positive or negative one?
4. Did your coach always behave appropriately with you and the other athletes on your team?
5. If there was inappropriate behaviour toward athletes, where did it happen?
6. Why and how was this behaviour able to continue?
7.
  - a) Were there adults who were aware, or should have been aware, of this inappropriate behaviour?
  - b) If there were adults who were aware, or should have been aware of inappropriate behaviour, who were these adults? Did they hold positions of authority in your sport? Did they report these incidents? If not, why do you think they did not report the incidents?
  - c) If there were no adults aware of the behaviour, why was this the case?
8.
  - a) Did your sport organization take action to prevent further inappropriate behaviour by your coach toward the athletes?
  - b) Did anyone take action to prevent further inappropriate behaviour by your coach toward athletes?
  - c) If there was no action taken, why do you think this was?
9.
  - a) Did you personally take any action or tell anyone about the inappropriate behaviour of your coach?
  - b) Why did you or why did you not take such action, and if you took action, to whom did you speak or write?
10. Why does it sometimes take years before a complaint against a former coach is reported?

11. What circumstances might have made you more likely to report the actions of your coach to authorities?

12. a) Were there measures in place at your sport organization, for the protection of athletes, when you were competing?

b) If yes, why did these measures fail?

### **Section B: Comparing the Past and the Present**

13. Do you think there are better protections in place for athletes today than there were when you were competing?

14. What improvements do you think have been made?

15. What problems do you think still exist with respect to protecting athletes from sexual exploitation by coaches?

16. Do you feel that the coaches or the athletes receive better protection from sports organizations?

17. Do you think athletes today have more awareness of these issues and of their rights as athletes?

18. Could sexual exploitation of athletes by coaches still happen today?

19. Whose responsibility should it be to make sure that the mental and physical wellbeing of athletes is looked after?

### **Section C: Changes for the Future**

20. What kind of screening, protections or methods for enforcement of safety precautions do you think are necessary to protect athletes in the future?

21. Do you think we have adequate screening of coaches? What do you recommend?

22. Do you think we have adequate reporting systems for athletes? What do you recommend?

23. Do you think sports organizations respond quickly and appropriately to athlete complaints? What do you recommend?

24. What kind of action should sports organizations take when they receive a complaint about a coach?

25. What kind of repercussions should sports organizations impose on coaches who have acted in ways that contravene the sport organization's regulations with respect to sexual exploitation?

26. Do you think individuals other than athletes should be allowed to register complaints regarding sexually exploitative behaviour by coaches?

27. Do you think some sports organizations are currently doing a better job than others in dealing with issues of sexual exploitation of athletes by coaches?

28. If we could make one change, what is the best thing that could be done to assure that athletes receive protection in the future?

# RESEARCH QUESTIONS FRENCH VERSION

## QUESTIONS D'ENTRETIEN

### Partie A – Vos expériences sportives

1. À quel sport avez-vous participé ?
2. Quand et à quel niveau avez-vous compétitionné ?
3. Est-ce que votre expérience athlétique a été plutôt positive ou plutôt négative ?
4. Est-ce que votre entraîneur a toujours agi de manière appropriée avec vous et les autres athlètes de votre équipe ?
5. S'il y a eu des comportements inappropriés envers des athlètes, où et à quelle fréquence ceux-ci ont-ils eu lieu ?
6. Pourquoi et comment ces comportements ont-ils pu continuer ?
7. Y avait-il des adultes au courant, ou qui auraient dû être au courant, de ce qui se passait ?
  - a) Si des adultes étaient au courant de comportements inappropriés, qui étaient ces adultes ? Détenaient-ils des positions d'autorité dans votre sport ? Pourquoi croyez-vous que ces personnes n'ont pas signalé ces incidents ?
  - b) S'il n'y avait pas d'adulte au courant de comportements inappropriés, pourquoi était-ce le cas ?
8.
  - a) Est-ce que votre organisation sportive a pris des mesures pour prévenir d'autres comportements inappropriés par votre entraîneur envers les athlètes ?
  - b) Est-ce que quelqu'un a pris des mesures pour prévenir d'autres comportements inappropriés par votre entraîneur envers les athlètes ?
  - c) Selon vous, si aucune mesure n'a été prise, pourquoi était-ce le cas ?
9.
  - a) Avez-vous personnellement pris des mesures ou parlé avec quiconque des comportements inappropriés de votre entraîneur ?
  - b) Pourquoi avez-vous ou pourquoi n'avez-vous pas pris de mesures, et si vous avez agi, à qui avez-vous parlé ou écrit ?
10. Pourquoi faut-il parfois des années avant qu'une plainte contre un entraîneur soit signalée ?

11. Quelles circonstances auraient fait en sorte qu'il aurait été plus probable que vous signaliez les comportements de votre entraîneur aux autorités ?

12.

a) Y avait-il des mesures en place dans votre organisation sportive afin de protéger les athlètes lorsque vous compétitionniez ?

b) Si oui, pourquoi ces mesures ont-elles échoué ?

### **Partie B – Comparer le passé et le présent**

13. Pensez-vous que de meilleures protections pour les athlètes sont en place aujourd'hui que lorsque vous compétitionniez ?

14. Selon vous, quelles améliorations ont été apportées ?

15. Selon vous, quels problèmes existent encore à l'égard de la protection des athlètes d'exploitation sexuelle par les entraîneurs ?

16. Croyez-vous que les entraîneurs ou les athlètes reçoivent le plus de protection des organisations sportives ?

17. Croyez-vous que les athlètes d'aujourd'hui sont plus conscients de ces enjeux et de leurs droits comme athlètes ?

18. Est-ce que l'exploitation sexuelle d'athlètes par des entraîneurs pourrait encore arriver aujourd'hui ?

19. Qui devrait être responsable de s'assurer que le bien-être physique et mental des athlètes soit supervisé ?

### **Partie C – Changements pour l'avenir**

20. Selon vous, quels types de sélections, protections ou méthodes d'application de précautions de sécurité sont nécessaires pour protéger les athlètes à l'avenir ?

21. Croyez-vous que nous avons une sélection adéquate des entraîneurs ? Que recommandez-vous ?

22. Croyez-vous que nous avons des systèmes de signalement adéquats pour les athlètes ? Que recommandez-vous ?

23. Croyez-vous que les organisations sportives répondent rapidement et de manière appropriée aux plaintes des athlètes ? Que recommandez-vous ?



24. Quelles actions devraient prendre les organisations sportives lorsqu'elles reçoivent des plaintes au sujet d'un entraîneur ?
25. Quelles conséquences devraient être imposées par une organisation sportive aux entraîneurs qui ont agi de manière à contrevenir aux règlements de l'organisation sportive ?
26. Croyez-vous que des personnes autres que des athlètes devraient pouvoir faire des plaintes ?
27. Croyez-vous que certaines organisations sportives font un meilleur travail que d'autres à l'égard des enjeux liés à l'exploitation sexuelle d'athlètes par les entraîneurs ?
28. Si nous pouvions faire un seul changement, quelle est la meilleure chose qui pourrait être accomplie pour assurer que les athlètes reçoivent de meilleures protections à l'avenir ?