Toward a Restorative Approach to Sport in Canada

by

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Abstract

For the last 30 years there has been documented evidence of wide-spread abuse of athletes in Canada. Canadian sport, now, finds itself at a crossroads due to the evidence of this systemic abuse of athletes which has persisted notwithstanding attempts to respond. In this thesis I argue that restorative justice as a relational theory of justice provides a lens through which we can better understand the problem of maltreatment and provides a pathway to transform the current response mechanisms for maltreatment into those more oriented toward wellbeing and more capable of attending to the relational nature of abuse in sport.

List of Abbreviations Used

AAP – Athlete Assistance Program

ADR – Alternative Dispute Resolution

CAC – Coaching Association of Canada

CADP – Canadian Anti-Doping Program

CCES – Canadian Centre for Ethics in Sport

COA/COC – Canadian Olympic Association/Committee

CSP – Canadian Sport Policy

CTFA – Canadian Track and Field Association

DSO – Director of Sanctions and Outcomes

FASA – Fitness and Amateur Sport Act

MSO – Multi Sport Organization

NCCP – National Coaching Certification Program

NSSHCC – Nova Scotia Home for Coloured Children

NSO – National Sport Organization

OSIC – Office of the Sport Integrity Commissioner

PEDs – Performance Enhancing Drugs

PSO -- Provincial Sport Organization

PASA – Physical Activity and Sport Act

RI – Restorative Inquiry

SDRCC – Sport Dispute Resolution Centre of Canada

SFAF – Sport Funding Accountability Framework

SEA – Sport Environment Assessment

SIRC – Sport Information Resource Centre

UCCMS – *The Universal Code of Conduct to Prevent and Address Maltreatment in Sport*

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CHAPTER 1: INTRODUCTION

1.1 The Problem

For the last 30 years there has been documented evidence of wide-spread abuse of athletes in Canada. In the academic literature and among those who work in the sport abuse field, abuse of athletes, whether it is physical, psychological, emotional, or sexual, is commonly referred to as "maltreatment".[1] Maltreatment "is an umbrella term used in the child development and psychology literatures to refer to 'volitional acts that result in or have the potential to result in physical injuries and/or psychological harm'".[2] The first prevalence study of maltreatment in Canada was completed in 1996 and declared that its "extremely disturbing" findings "[reveal] patterns of systematic sexual harassment and abuse of athletes often by authority figures and requiring further investigation on a sport by sport basis, and at all levels of sport competition".[3] More recently, Erin Wilson and her colleagues conducted a second prevalence study in 2021 surveying 995 current or retired national team athletes in Canada and found that 75% of the athletes had experienced maltreatment of some kind.[4] During the time between those two studies sport stakeholders took steps to address maltreatment but, evidently, the strategies they employed were insufficient to task.[5] Canadian sport, now, finds itself at a crossroads

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[1] Sport Information Resource Centre, *Re: The Universal Code of Conduct to Prevent and Address Maltreatment in Sport, 5.1*, Ottawa: Sport Information Research Centre, 2019 [accessible here: https://sirc.ca/wp-content/uploads/2020/01/UCCMS-v5.1-FINAL-Eng.pdf] at 4.

[2] Gretchen Kerr *et al*, "Maltreatment in Youth Sport: A Systemic Issue" (2019) 8:3 Kinesiology Review 237 at 237 [Kerr *et al*, "Maltreatment in Youth Sport"] citing CV Crooks & DA Wolfe "Child Abuse and Neglect" in E.J. Mash & R.A. Barkley eds *Assessment of Childhood Disorders* 4th ed (New York: Guilford Press, 2007) at 640.

[3] Sandra L Kirby, Lorraine Greaves & Olena Hankivsky, "Women under the Dome of Silence: Sexual Harassment and Abuse of Female Athletes" (2002) 21:3 Canadian Woman Studies; Sandra L Kirby & Lorraine Greaves, "Un jeu interdit: le harcèlement sexuel dans le sport" (1997) 10:1 Recherches féministes

[4] E. Willson *et al*, "Prevalence of Maltreatment among Canadian National Team Athletes" (2021) 37:21-22 Journal of Interpersonal Violence at 9.

[5] Peter Donnelly *et al*, "Protecting Youth in Sport: An Examination of Harassment Policies" (2016) 8:1 International Journal of Sport Policy and Politics 33; See also, AE Stirling *et al*, "Canadian Academy of

confronted by the evidence of institutional abuse of athletes at every level which has persisted notwithstanding attempts to respond.[6]

The development of Canada's strategies for responding to maltreatment reveals that all of its most popular iterations are largely based on an imperfect analogy with the logic of criminal and civil law as well as early workplace harassment procedures[7]. These strategies reactively attend to discrete instances of harm and do not examine or seek to understand the broader context in which the maltreatment occurs.[8] This means that they do not reveal the root causes of maltreatment and cannot, therefore, comprehensively work to proactively eradicate or even mitigate the prevalence of maltreatment.[9] Mike Hartill writes:

> As in other contexts, the instinctive reaction has been to blame deviant individuals and focus on the development of protection policies to keep the "bad men" out, rather than to reflect critically on the sociocultural, masculinist environments that may support sexual violence. According to Brackenridge "collective denial effectively blinded sport administrators to the possibilities that they might actually be harbouring or facilitating sexual exploitation in their own organisations".[10]

Sport and Exercise Medicine Position Paper: The Clinician's Role in Addressing and Preventing Maltreatment in Sport-10-Year Anniversary" (2023) 33:2 Clin J Sport Med at 103.

[6] The seriousness of this moment in time is reflected in a number of parliamentary hearings about the subject as well as the announcement of a federal commission to investigate, among other things, the nature of sport culture. See: Canada, The Canadian Standing Committee on the Status of Women, *Time to Listen to Survivors: Taking Action Towards Creating a Safe Sport Environment for All Athletes in Canada*, (Ottawa: The Canadian Standing Committee on the Status of Women, 2023) (Chair: Karen Vecchio); Canada, Canadian Heritage, "The Future of Sport in Canada Commission: Terms of Reference" (Ottawa: Government of Canada, 2023) online: https://perma.cc/Y4LJ-ARDG [last accessed on May 27, 2024]).

[7] Rachel Corbett, *Harassment in Sport: A Guide to Polices, Procedures and Resources* (Gloucester, ON: Canadian Association for the Advancement of Women and Sport, 1994) [Corbett, *Harassment in Sport*].

[8] Donna Coker, "Crime Logic, Campus Sexual Assault, and Restorative Justice" (2016) 49 Tex Tech L Rev 147; Jennifer J Llewellyn, "Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice" (2002) 52:3 U Toronto LJ 253 [Llewellyn, "Legacy"]; Jennifer J Llewellyn, "Responding Restoratively to Student Misconduct and Professional Regulation", in John Braithwaite Gale Burford, and Valerie Braithwaite, ed, *Restorative and Responsive Regulation* (New York, Routledge: 2019) [Llewellyn, "Responding"]; Stephanie Anne Dixon, *Athletes' Experiences of Addressing Maltreatment through a Reporting Process: A Critical Narrative Analysis as Guided by Trauma-Informed Practice* (Master of Science, University of Toronto, 2022).

[9] Cf. Llewellyn, "Legacy", *supra* note 8.

[10] Mike Hartill, "Concealment of Child Sexual Abuse in Sports" (2013) 65:2 Quest 241 at 243 citing Celia H Brackenridge, *Spoilsports: understanding and preventing sexual exploitation in sport*. (London: Routledge, 2001) at 237.

There is general scholarly agreement[11] with Hartill's observation that sport culture contributes to the *continued* prevalence of maltreatment in Canadian sport, however the strategies sport stakeholders use to respond have not shifted to reflect this understanding.

1.2 A Proposed Solution

In this thesis I provide a conceptual account of *why* Canada responds to maltreatment complaints the way it does, describe a different conceptual framework for understanding the nature of harm and justice in sport, and then explain the differences that new conceptual framework would make to how we understand and evaluate the effectiveness of our current response strategies as well as how we might design and build mechanisms better suited for responding to maltreatment. I will argue that the current approach to responding to maltreatment is symptomatic of a sport culture shaped by transactional liberal legalism which instills values of individualism, instrumentalism, and winning-at-all-costs into the social and political structures it generates. I also argue that restorative justice understood as a feminist relational theory of justice provides us with a lens through which we can critique and transform the current response mechanisms for maltreatment into those more oriented toward wellbeing which attend to the nature of maltreatment.

My thesis progresses according to the following structure. In chapter 2, I analyze the development of sport policy in Canada from the late 1960s until the present day. I

[11] Sandy Kirby *et al*, *The Dome of Silence: Sexual Harassment and Abuse in Sport* (Halifax, Fernwood: Publishing Limited, 2000); Misia Gervis and Nicola Dunn, "The Emotional Abuse of Elite Child Athletes by Their Coaches" (2004) 13:3 Child Abuse Review 215; Frank Jacobs *et al*, "'You Don't Realize What You See!': The Institutional Context of Emotional Abuse in Elite Youth Sport" (2017) 20:1 Sport in Society 126; Emma Kavanagh *et al*, "Managing Abuse in Sport: An Introduction to the Special Issue" (2021) 23:1 Sport Management Review 1; Kerr *et al*, *supra* note 2; Wendy MacGregor, "It's Just a Game until Someone Is Sexually Assaulted: Sport Culture and Perpetuation of Sexual Violence by Athletes" (2018) 28:1 Educ & LJ.

review the comprehensive evidence that sport culture developed with, and is dominated by, a bias toward high-performance outcomes fueled by political aspiration and a culture built on rationalization.[12] Rationalization, for our purposes, is what happens as more and more people orient themselves toward instrumental rationality and act based on calculated and materially-derived goals. According to sport policy scholars, Macintosh and Whitson: "'Rationalization' […] refers to a historical process in which successive human institutions are subjected to scientific analysis, and are reshaped so as to increase efficiency and productivity".[13] Cantelon and Ingham say: "[rationalization] is a process of systematization and standardization, the result of which is to increase the number of cases to which explicit, impersonal rules and procedures can be applied."[14] I use the idea of rationalization to frame how we understand the way in which Canada's sport policy ecosystem developed. It provides a framework for understanding and interpreting how decisions were made and conclusions reached. It also provides a set of normative values around which we will see sport culture organizes itself and creates the conditions for maltreatment to occur.

Chapter 3 overlaps chronologically with the material covered in chapter 2, but its focus is the liberal legalism in sport and how it gives rise to and shapes maltreatment response mechanisms. I demonstrate the degree to which sport has incrementally become

[12] Bruce Kidd, "The Philosophy of Excellence: Olympic Performances, Class Power and the Canadian State" (2013) 16:4 Sport in Society 372 [Kidd, "Excellence"]; David Whitson and Donald Macintosh, "Rational Planning vs. Regional Interests: The Professionalization of Canadian Amateur Sport" (1989) 15:4 University of Toronto Press on behalf of Canadian Public Policy 436; *Pressure Groups and Canadian Sport Policy: A Neo-Pluralist Examination of Policy Development* (PhD Thesis, University of Western Ontario, 2008) [unpublished]; Donald Macintosh, Tom Bedecki & CES Franks, *Sport and Politics in Canada* (Montreal & Kingston: McGill-Queen's University Press, 1987).
[13] Donald Macintosh & David Whitson, *The Game Planners* (Montreal & Kingston: McGill-Queen's University Press, 1990) at 10.
[14] Hart Cantelon and Alan Ingham, "Max Weber and the Sociology of Sport", in J Maguire & K Young eds, *Theory, Sport & Society* (Boston: JAI Press Inc., 2001) at 67.

ordered and constituted through a kind of legal logic called liberal legalism. This legal ordering, I argue, is connected to the rationalization process discussed in chapter 2.[15] My argument on this point relies on Cary Boucock's examination of Max Weber's sociology of law and his application of Weber's thought to describe the modern legal world.[16] According to Boucock, one important characteristic of modernity is the difference in relationships from traditional, face-to-face, personal relationships to more formalized relationships often using legal contracts.[17] Furthermore, as traditional forms of authority (based on inherited sovereignty or divine right) recede, the individual's new autonomy crystallizes in the idea of subjective rights.[18] Boucock writes: "The notion of legal rights provides a safeguard for autonomy through the formulation of immunities due to people in terms of legal rights that anchor individual autonomy as an 'end' in itself".[19] I pay particular attention to where we see the formalization of relationships as well as the assertion of individualistic rights in terms of contracts, due process, and human rights.

Chapters 2 and 3 work together to tell the story of how Canada ended up with the problem it now faces. That is to say that there is conceptual continuity between the high-performance bias in sport policy and the reliance on liberal legalism which can be understood in terms of the process of rationalization and align with its structural dynamics.

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[15] Cf. Amy J Cohen, "Dispute System Design, Neoliberalism, and the Problem of Scale" (2009) 14:1 Harv Negot L Rev 51; Christine B. Harrington and Sally Engle Merry, "Ideological Production: The Making of Community Mediation" (1988) 22:4 L & Soc'y Rev 709.
[16] Cary Boucock, *In the Grip of Freedom: Law and Modernity in Max Weber* (Toronto: Toronto University Press, 2000).
[17] *Ibid* at 60 and 113-14.
[18] *Ibid* at 117.
[19] *Ibid* at 118.

I turn, in chapter 4, to describe feminist relational theory and restorative justice. Feminist relational theory begins from the premise that human beings are always already in relationships with one another and that those relationships are, themselves, structured and nested within networks of relations.[20] Koggel et al., tell us that there are branches of theory and philosophy which engage with similar ideas and concepts, but feminist relational theory comes with its own unique contributions.[21] I focus on how a feminist relational theory changes our understanding and analysis of justice so that when we do the work of restorative of justice we do so transformatively.[22] When I discuss restorative justice in this thesis, I am not referring to specific codified set a of practices or procedures, but a way of approaching and understanding creating the conditions for justice grounded in feminist relational theory. I am, in other words, following Jennifer Llewellyn's way of theorizing in and through practical application restorative justice and its principles.[23]

Chapter 5 critiques Canada's current response mechanisms for maltreatment through the lens of Llewellyn's relational theory of justice explained in chapter 4. This chapter engages primarily with the *Universal Code to Prevent and Address Maltreatment in Sport*[24] ("UCCMS") and the Office of the Sport Integrity Commissioner's ("OSIC") Complaint Management Process. I demonstrate that when we analyze these processes and

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[20] Jocelyn Downie and Jennifer J Llewellyn, "Introduction" in J Downie & JJ Llewellyn eds, *Being Relational: Reflections on Relational Theory and Health Law* (Vancouver: UBC Press, 2011) at 4.
[21] Christine M Koggel, Ami Harbin & Jennifer J Llewellyn, "Feminist Relational Theory" (2022) 18:1 Journal of Global Ethics 1 at 1.
[22] Jennifer J Llewellyn, "Transforming Restorative Justice" (2021) 4:3 The International Journal of Restorative Justice 374 [Llewellyn, "Transforming"].
[23] Jennifer J Llewellyn, "Restorative Justice: Thinking Relationally About Justice", in Jocelyn Downie & Jennifer J Llewellyn eds, *Being Relational: Reflections Relational Theory and Health Law* (Vancouver, UBC Press: 2011) [Llewellyn, "Thinking"].
[24] *SDRCC, The Universal Code to Prevent and Address Maltreatment in Sport, 6.0,* Montreal, SDRCC, 2022 [accessible here: https://sportintegritycommissioner.ca/files/UCCMS-v6.0-20220531.pdf] [UCCMS].

policies through a relational lens, we can see their insufficiencies *vis-à-vis* responding to the harm experienced by athletes and attending to the root causes of harm.

Chapter 6 concludes by imagining what difference it would make to think relationally about justice in sport. Much of this chapter revolves around how we could respond to instances of maltreatment differently, i.e. replace our current complaint mechanisms with a restorative pathway informed by relational principles. I describe some of the implications of taking a restorative responding to maltreatment which is oriented toward building future wellbeing in sport rather than punishing individuals for past actions. Rather than continuing to delink the proactive from the reactive responses to maltreatment, a relational and restorative approach to sport sees these activities as necessarily and iteratively connected.

At the heart of my argument throughout this thesis is the assumption that maltreatment is best understood and responded to relationally.[25] This means that the eradication and prevention of maltreatment is not just a question of disciplining or punishing wrongdoers but of recognizing and appreciating the impact of our inherent connectedness to one another.[26] By demonstrating first why and how the sport culture developed into the one it is today and, second, how our current response mechanisms are artefacts of that culture and its adoption of a liberal legalism we will see the necessity for a new way forward. This thesis is meant to be a starting point and offers the first steps and an agenda for considering what we can and must do to move forward in a good way.

[25] Regarding, relational vs. non-relational maltreatment see, *infra*, note 410.
[26] Llewellyn & Downie, *supra* note 20; and Koggel *et al*, *supra* note 21.

CHAPTER 2: RATIONALIZATION AND THE DEVELOPMENT OF THE CULTURAL ORIGINS OF MALTREATMENT

> *There is a moral crisis in sport. We are at a crossroads and must decide whether the values that once defined the very meaning of sport still have meaning in the context of sport today*.[27]

2.1 Introduction

The federal government's involvement in sport in Canada began politically and set the policy agenda to focus on elite, international, and national level athletes.[28] This bias toward high-performance became the beating heart of a "highly rationalized" system of professionals and bureaucrats.[29] Sport organizations and athletes were confronted by transactional relationships between themselves, the government, and funding agencies whereby funding and/or their existences were contingent on performance. This scenario has policy implications for the way that sport is structured and governed, but it also has implications which manifest in the way that these structures determine the decision making and relational positions of the people involved in sport. I discuss below how the use of performance enhancing drugs and maltreatment take shape in a sport culture which gives way to the normalization of harm and the instrumentalization of people, so that the decision to cause harm whether by physical or psychological abuse or by abusing performance enhancing drugs is clouded by the logic of high-performance.

I argue that Canada's politically motivated rationalization toward and around high-performance sport results in a culture grounded in individual excellence (as opposed to collective wellbeing), instrumentality, and bodily sacrifice. These values frame how

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[27] *Dubin Inquiry*, *infra* note 90 at 520.
[28] Macintosh *et al*, *supra* note 12 at 4.
[29] *Ibid*.

participants treat one another and themselves because they underly the very nature of the sport system. This is the origin of the culture of sport which contributes to prevalence of maltreatment.[30]

2.2 The Federal Government's Early Politicization of Amateur Sport: Setting the Stage for Rationalization

There are many thoughtful engagements with the federal government's entry into amateur sport,[31] I want to draw out the way in which the politicization of sport led the government's involvement toward high-performance. This politicization manifests as a clear choice to incentivize sport rather than regulate it.

Because they frame and contribute to the decisions of the federal government it is worthwhile to take note of some constitutional complexities of the federal government's involvement in sport. Ultimately, there is no clear indication of which level of government is responsible for sport, so each jurisdiction builds sport into other heads of power. Jean Harvey describes the situation:

> The *Constitution* is in fact silent on sport and physical activity for one good reason: At the time of the drafting of the Constitution, the fathers of the confederation did not have to care about sport since it was then in its infancy and nowhere on the political map. However, since then, sport has become generally associated with education and/or health, both of which fall under the jurisdiction of the provincial/territorial governments…. [The federal government's] overall role mainly concerns matters of national and international affairs. As a result, the federal government has clear jurisdiction on matters that relate to national level sport as well as to international sport.[32]

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[30] Kerr *et al*, *supra* note 2; Stirling *supra* note 5 citing Bringer JD, Brackenridge CH, & Johnston LH, "The name of the game: a review of sexual exploitation of females in sport" *Curr Womens Health Rep*. 2001:1 225–231; Jacobs *et al*, *supra* note 11.

[31] See Macintosh *et al*, *supra* note 12; Church, *supra* note 12; Lucie Thibault & Jean Harvey, "The Evolution of Federal Sport Policy from 1960 to Today" in Lucie Thibault & Jean Harvey eds, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013) at 13; Bruce Kidd, "The Canadian State and Sport: The Dilemma of Intervention" (2013) 16:4 Sport in Society 362 [Kidd, "Dilemma"]; Macintosh & Whitson, *supra* note 13.

[32] Jean Harvey, "Multi-Level Governance and Sport Policy in Canada", in Lucie Thibault & Jean Harvey, eds, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013) at 44.

Thus, the provinces and territories place sport under other constitutional headings within existing systems which are geared toward public services whereas the federal government associates sport more with the identity of Canada both domestically and internationally. Even at this early stage, we can see that sport for the federal government is not about the federal government providing something to Canadians. The federal government sees its role as primarily incentivizing certain aspects of sport which are reputationally expedient.

The *Fitness and Amateur Sport Act*, passed in 1961, functionally acted as a way of permitting the government to be involved in sport without creating substantial obligations on that involvement.[33] The objects of *FASA*, which was repealed in 2003, "are to encourage, promote, and develop fitness and amateur sport in Canada".[34] It does not contain explicit indications of a bias toward high-performance, however, the powers it provided the government were primarily related to supporting international sport success and *some* general fitness through grants to provincial programs.[35] It could fund different programs as it saw fit without much need to explain its decisions.[36]

FASA allowed the federal government to support sport in ways which constructed a positive Canadian identity through success in sport and to redeem the tarnished international reputation of the fitness of Canadians. *FASA* passed into law two years after Prince Philip "decried the state of fitness of Canadians and challenged the medical profession to take steps to rectify this deficiency".[37] And it was passed under Prime Minister John Diefenbaker who had argued that:

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[33] *Fitness and Amateur Sport Ac*t, RSC 1985, c F-25, as repealed by *Physical Activity and Sport Act*, 2003, c 2, s 39. [*FASA*]
[34] *Ibid* at s 3.
[35] *Ibid* at ss 3(a-j); See also Macintosh *et al*, *supra* note 12 at 28-29; Thibault & Harvey *supra* note 31 at 13.
[36] Macintosh *et al*, *supra* note 12 at 28-29.
[37] *Ibid* at 11.

> there are tremendous dividends in national pride from some degree of success in athletics. The uncommitted countries of the world are now using these athletic contests as measurements of the strength and power of the nations participating.[38]

He believed that supporting amateur sport would make "a great Canada".[39]

By defining sport in terms of athletic achievements which affect national pride and international reputation, the federal government began to emphasize a specific strand of sport which now we refer to as high-performance. This is the beginning, in other words, of the high-performance bias because the government prioritizes sport *for the sake of* high-performance excellence rather than sport *for the sake of* health or building community. This is not to say that the federal government did not do those things or see sport's implications therein, but I am identifying its policy focus. Certainly, the constitutional questions surrounding sport play into the juxtaposition between high-performance sport and mass sport or recreational sport, but the federal government chose to associate sport with the identity of Canada rather than as something constructive of health and wellbeing of Canadians.[40] Moreover, as we will see below, it continues to make that choice throughout the development of sport policy in Canada. The federal government cannot hide behind constitutionality completely since it has and does invest some funding into recreation and healthy living programming under the Department of Health.[41] *Sport*, from this point forward, however, is ultimately understood to be about Canada's image and desire for excellence.

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[38] Canada, 'House of Commons'. Debates November 21 (1960): 39 cited in Kidd, "Dilemma" *supra* note 31 at 363.
[39] *Ibid*.
[40] Cf. Mick Green, "Olympic Glory or Grassroots Development?: Sport Policy Priorities in Australia, Canada and the United Kingdom, 1960 – 2006" (2007) 24:7 The International Journal of the History of Sport 921 at 930.
[41] Public Health Agency of Canada, "Promoting physical activity" (Government of Canada, 2018-10-1:https://www.canada.ca/en/public-health/services/being-active/promoting-physical-activity.html [last accessed on May 21, 2024]).

There are two aspects of the government's early involvement in sport of which are important to note before moving on. Firstly, the government chose to engage in sport not as a regulator but by financially incentivizing and supporting national and international level sport. Secondly, this posture assumes that the world operates transactionally and by allocating budget lines to sport there will be a positive effect. This presumes a kind of inherent rationality to the system, i.e., that we can use market forces to drive human behaviour. Hence, we can see an overlap between the rationalization of sport, discussed below, and the high-performance bias begin to take shape even at this early stage in the history of sport policy.

2.2.1 Pierre Elliot Trudeau's Politicization of Sport

The federal government's involvement in sport ramped up under Pierre Elliot Trudeau in the late 1960s and early 1970s, and we see an intensification of the government's attention both on the political utility of sport and on the performance of international and national level athletes. Part of this intensification is a result of the fact that Trudeau explicitly politicized sport by including it as part of his campaign.[42] By campaigning on promises of improving sport, Trudeau shifted the public discourse around sport more toward the idea that sport refers to high-level competitive sport which has the symbolic quality of uniting Canada.[43]

Commentary on this moment in Canadian sport policy tends to agree that Trudeau sought to use sport as symbol for a united Canada against the backdrop of a Canada divided along linguistic and ethnic lines. Macintosh *et al*, argue that Trudeau's strategy to use sport as a political rallying point for the country developed out of a "national-unity

[42] Macintosh *et al*, *supra* note 12 at 53; See also Thibault and Harvey, *supra* note 31 at 13.
[43] Macintosh *et al*, *supra* note 12 at 53.

crisis".[44] They suggest that French-speaking forces in Quebec working for separation, and a general fear of economic domination by the United States created a tension between the federal and provincial governments as well as a general sense of malaise among Canadians.[45] Bruce Kidd agrees on this point and adds that "Aboriginal people's anger, and the growing ethnocultural diversity that challenged traditional identities and allegiances" contributed to the sense of a divided country.[46] To create a sense of national unity Trudeau sought to provide the Canadian people with an international sport reputation they could be proud of and for which they could collectively cheer. As Kidd puts it in another essay:

> Whereas the Conservatives saw sport as important for the external image of Canada, the Liberals sought to develop athletic success for the image Canadians have of themselves. It was perhaps an unconscious response to the declining legitimacy of the 'Liberal idea of Canada' in the face of the resurgence of Quebec's aspirations for independence, growing unemployment and regional disparity, and the accelerating underdevelopment of the national economy and cultural life by multinational capital. But it led to increased federal intervention in sport.[47]

After his election, one of the first steps this intervention into sport that Trudeau takes is to strike a task force to examine three main items:

1. to report on prevailing concepts and definitions of both amateur and professional sport in Canada and the effect of professional sport on amateur sport.
2. to assess the role of the federal government in relation to non-governmental, national and international organizations and agencies in promoting and developing Canadian participation in sport; and
3. to explore ways in which the Government could improve further, the extent and quality of Canadian participation in both sport at home and abroad.[48]

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[44] Macintosh *et al*, *supra* note 12 at 42-46.
[45] *Ibid* at 46.
[46] Bruce Kidd, "Canadians and the Olympics" (2001) Library and Archives Canada [accessible here: https://www.collectionscanada.gc.ca/databases/olympians/001064-1030-e.html]; Kidd, "Excellence" *supra* note 12.
[47] Kidd, "Dilemma", *supra* note 31 at 364.
[48] Canada, Dept. of National Health and Welfare, *Task Force on Sports for Canadians*, (Ottawa: Dept. of National Health and Welfare, 1969) (Chair: W Harold Rea) [*Task Force Report*] at ii.

The Task Force made an extensive list of recommendations including: a formal distinction between amateur and professional athletes effectively based on whether the athlete secured their "livelihood" from sport;[49] more funding be given to sport in Canada across all areas[50]; and the creation of an independent non-profit corporation called Sport Canada.[51] The Task Force also recommended creating a stronger "national team concept" to "shift many young Canadians from an over-idolization of professional sport and its stars" so that the "objective of their sporting ambition is to play on a national team".[52]

The findings of this task force jumpstarted the involvement of the federal government in sport which ends up revolving, predictably, around international elite sport, but the inspiration for the investigation and *Task Force Report* were probably political answers to the national unity crisis.[53] Macintosh *et al*, point out that within seven months of the *Task Force Report*'s release 80% of all the recommendations had been implemented and some were even 'implemented' *before* it was released.[54] There is a sense that the *Task Force Report* enumerated several justifications for the federal government's greater involvement in sport, but these justifications were born out of a political expediency.[55] That is to say that, the government wanted to be more involved in sport because it seemed politically useful to improve national unity and international reputation; the *Task Force Report's* recommendations were a vehicle for that intervention.

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[49] *Task Force Report*, *supra* note 48 at 79.
[50] *Ibid* at 81-86.
[51] *Ibid* at 86.
[52] *Ibid* at 67.
[53] Macintosh *et al*, *supra* note 12.
[54] *Ibid* at 60 citing Canada, Fitness and Amateur Sport Branch, *Fitness, Sport and the Canadian Government* (Ottawa: Fitness and Amateur Sport Branch, 1973) (Chair: J West) at 6.13-6.14.
[55] *Ibid* at 60.

For our purposes, however, it is not just *that* the government intervened in sport, but the ways in which it did so and the implications of its strategy for intervention. To put a fine point on it: the government's intervention underlines its bias toward high-performance and sport understood as reputation building success. We see this first in its treatment of *A Report on Physical Recreation, Fitness and Amateur Sport in Canada* (the "*Ross Report*")[56] which was produced quickly after the *Task Force Report*. The *Ross Report* recommended broadly that the federal government should be more invested in recreation and that Canadians should achieve a "level of physical fitness sufficient to contribute positively to physical and mental health".[57] The government mostly disregarded the *Ross Report*'s recommendations relating to recreation but accepted, to some degree, its uncontroversial suggestion around improving fitness.[58] This is a telling though unsurprising decision because encouraging people to be fit can be easily understood as part of health while involvement in recreation triggers constitutional complexities and is difficult to rationally monitor in terms of success.[59]

The federal government's official position on sport came in a 1970 white paper called, a *Proposed Sport Policy for Canadians*[60] which brought forward many of the

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[56] P.S. Ross and Partners, *A Report on Physical Recreation, Fitness and Amateur Sport in* Canada, (Ottawa: Government of Canada, 1969).
[57] Macintosh *et al*, *supra* note 12 at 61.
[58] *Ibid* at 61-2.
[59] Cf. Macintosh *et al*, *supra* note 12 at 75; See also Peter Donnelly and Bruce Kidd, "Two Solitudes: Grass-Roots Sport and High-Performance Sport in Canada", in Richard Bailey Margaret Talbot eds, *Elite Sport and Sport-for-All: Bridging the Two Cultures?* (London: Routledge, 2015); Harvey *supra* note 32. We ought to keep in mind that health is also not a simple head of power. The Supreme Court of Canada concluded:

> In sum "health" is not a matter which is subject to specific constitutional assignment but instead is an amorphous topic which can be addressed by valid federal or provincial legislation, depending in the circumstances of each case on the nature or scope of the health problem in question (*Schneider v. The Queen*, [1982] 2 SCR 112 at p. 142, cited in André Braën, *Health and the Distribution of Powers in Canada*, (Ottawa, Government of Canada: 2002) at 3)

[60] John Munro, *A Proposed Sport Policy for Canadians*, (Ottawa, Government of Canada: 1970)

recommendations of the *Task Force Report* including mostly funding devoted to high-performance sport initiatives.[61] This document indicates that the federal government's early involvement in sport would take the form of primarily funding specific sports, programs, and agencies dedicated to national level high-performance. For example: one of the largest investments discussed in the white paper is the creation of office space for National Sport Organizations ("NSOs") in Ottawa as well as funding for executive directors.[62] It also imagined adding another competitive event to the calendar called the "Canada Olympics" for which the government would cover travel costs.[63] There was also the announcement of larger scholarships and grants to incentivize promising athletes.[64] Although the white paper contained lofty words about the emphasis on participation rather than excellence, many of the programs and specific funding allocations it contains are ultimately about improving Canadian competitive outcomes. And we cannot forget that this is a step on the trajectory which began with a federal government recognizing sport success as a politically expedient way of building national unity and improving or bolstering Canada's international reputation.

The outcome of this period from 1961 until 1970 with the passing of *FASA* and then the subsequent *Task Force Report*, *Ross Report*, and Munro's *Proposed Sport Policy for Canadians* is the identification of sport in Canada with *high-performance* sport rather than recreational sport or general fitness. In this era, sport takes on new political valences and significance in terms of national unity at home and national pride abroad.

[61] Macintosh *et al*, *supra* note 12 at 69-70.
[62] Munro, *supra* note 60 at 31.
[63] Munro, *supra* note 60 at 35.
[64] *Ibid* at 41-2.

2.3 Rationalization and Sport

Having solidly committed to some involvement in sport due to its political utility *vis-à-vis* national unity and international reputation, the federal government in Canada is poised, in the 1970s and 1980s, to begin resourcing and developing this involvement in a way which many sport sociologists describe in terms of rationalization.[65] The idea of rationalization comes primarily from the work of Max Weber who argued that human action has become "increasingly rational over the course of history".[66] For Weber: "taking place in all areas of human life from religion and law to music and architecture, rationalization means a historical drive towards a world in which 'one can, in principle, master all things by calculation'".[67] Applying Weber's thinking to sport, Robin Beamish argues that high-performance sport is a product of modernity which understands itself in a goal-oriented way focused on "means-ends efficiency".[68] Macintosh and Whitson also describe the creeping "rationalization" of sport in ways which emphasize technical expertise and objectivity thereby reducing access and participation in decision making for

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[65] Whitson & Macintosh, *supra* note 12; Lisa M. Kikulis, Trevor Slack & Bob Hinings, "Institutionally Specific Design Archetypes: A Framework for Understanding Change in National Sport" (1992) 27:4 International Review for the Sociology of Sport; Lucie Thibault, Trevor Slack & Bob Hinings, "Professionalism, Structures and Systems: The Impact of Professional Staff on Voluntary Sport Organizations" (1991) International Review for the Sociology of Sport 83-98; Trevor Slack, "The Bureaucratization of a Voluntary Sport Organization" (1985) 20:3 International Review for the Sociology of Sport 145-164; Macintosh and Whitson, *supra* note 13; Cantelon & Ingham, *supra* note 14; Rob Beamish & Ian Ritchie, *Fastest, Highest, Strongest: A Critique of High-Performance Sport* (London: Routledge, 2006); M Green & B Houlihan, Elite *Sport Development: Policy and Learning Political Priorities* (London: Routledge, 2005); Rob Beamish, "The Dialectic of Modern, High Performance Sport: Returning to the Dubin Inquiry to Move Forward", in Russell Field ed, *Playing for Change: The Continuing Struggle for Sport and Recreation* (Toronto: University of Toronto Press, 2015) at 134.; Bruce Kidd, "A New Orientation to the Olympic Games" (2013) 16:4 Sport in Society 464 [Kidd, "New Orientation"] (Originally published in Queen's Quarterly 98, no. 2 (1991): 363–74.).

[66] Roberta Garner, "Max Weber" in Roberta Garner ed, *Social Theory: Continuity and Confrontation* (Peterborough, ON: Broadview Press, 2001).

[67] Sung Ho Kim, "Max Weber", Edward N Zalta & Uri Nodelman eds, *The Stanford Encyclopedia of Philosophy* (Winter 2022 Edition), (Stanford University: https://plato.stanford.edu/archives/win2022/entries/weber/ [last accessed March 27, 2024]) citing Max Weber, "Science as Vocation" in Gerth, HH & C Wright Mills eds, *From Max Weber: Essays in Sociology* (Oxford: Oxford University Press, 1946) at 139.

[68] Beamish, *supra* note 65 at 125 and 141.

those without technical or professional acumen.[69] And Bruce Kidd sees the high-performance sport system as "dehumanizing" and dominated by "instrumental rationality".[70] He writes: "It devalues the athletes' intrinsic worth through its overwhelming emphasis upon medals and winners; and it makes competitors vulnerable to the pressures of economic hardship".[71]

Taken together what we see then in this commentary are examples of how rationalization shapes sport culture and the systems structuring the administration of sport around high-performance such that decisions which target the maximization of performance seem inevitable and incontrovertible. High performance, thereby, becomes the north star toward which the system rationalizes. This is deeply important to my analysis because by orienting sport in this way toward greater and greater performances we denude it of its humanity and force sport organizations and the people involved in them to regard human beings and their needs in terms of equations for which the solution is always more medals.

2.3.1 Professionalization and Bureaucratization

Within the scholarship devoted to the development Canadian sport there is a basic consensus that the rationalization of sport resulted in an increase in the number of professionals and the density of the bureaucratic infrastructure.[72] We can call these

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[69] Macintosh & Whitson, *supra* note 13 at 131.
[70] Kidd, "New Orientation", s*upra* note 65 at 466-7.
[71] *Ibid*.
[72] See for example: Rob Beamish and Jan Borowy, "High Performance Athletes in Canada: From Status to Contract", in Trevor Slack C.R. Hinings, ed, *The Organization and Administration of Sport* (London, Ontario: Sports Dynamics Publishers, 1984); Alan G Ingham and Stephen Hardy, "Sport: Structuration, Subjugation and Hegemony" (1984) 2:2 Theory, Culture & Society; Slack, *supra* note 65; Macintosh *et al*, *supra* note 12; Macintosh & Whitson, *supra* note 12; David J. Whitson and David Macintosh, "The Scientization of Physical Education: Discourses of Performance" (1990) 42:1 Quest; Lucie Thibault *et al*, "Professionalism, Structures and Systems: The Impact of Professional Staff on Voluntary Sport

increases the professionalization and bureaucratization of sport. The shift from volunteer to professional organizations has clear roots in John Munro's early sport policy decisions for the federal government which he says were undertaken to "to move the administration of sport off the kitchen table and into a more professional and efficient atmosphere".[73] This preference for professional governance over 'kitchen-table' governance exemplifies the rationalization of sport because it values the predictability and efficiency of professional governance models over the more *ad hoc* nature of community or grass-roots organizations.

I focus below on how professionalizing and bureaucratizing sport denatures its capacity to respond to human issues because it is exclusively focused on maximizing the medal count. In this way the professionalization and bureaucratization of sport is relevant to the development of how Canada currently responds to maltreatment because it shifted how the sport community understands and responds to certain kinds of issues. Macintosh and Whitson explain that although the greater inclusion of professionals within sport organizations will likely lead to increased performances, "the corollary of this technical progress has been a tendency to subordinate political and ethical questions – questions relating to the commitment of government to addressing gender, class, and regional inequities, for instance – to the pursuit of high-performance goals."[74] This anticipates the heavy reliance on legal professionals which will begin in the 1990s.

Organizations" (1991) International Review for the Sociology of Sport 83-98; and Green & Houlihan *supra* note 65.

[73] John Munro, *Sport Canada/Recreation Canada*. A report presented to the National Advisory Council on Fitness and Amateur Sport. May 7, 1971, at 2 cited in Kikulis *et al*, *supra* note 65 at 358.

[74] Macintosh & Whitson, *supra* 13 at 44.

Throughout the 1960s, 1970s, and 1980s we see a marked shift in the way sport organizations determine who should be involved in their organizations at a board level and what their jobs will be *not based on their experience or relationship to sport but based on professionalized credentials*.[75] Newly dubbed sport management professionals and high-performance professionals began to leverage their unique knowledge-base to fill these professionalizing roles now considered integral to amateur sport organizations.[76] Similarly the business of coaching and training high-performance athletes was beginning to require specialized knowledge and high level of education.[77] Trevor Slack discusses this phenomenon in relation to a specific provincial sport organization ("PSO") in the 1960s:

> With a more "business-like" approach to running the organization, the [PSO] began to practice a form of social closure, i.e., "the process by which social collectives seek to maximize rewards by restricting access to rewards and opportunities to a limited circle of eligibles". While this may have at first been an unconscious action, it soon developed into a conscious attempt to recruit individuals with business and professional skills.[78]

Inclusion criteria for doing mostly volunteer work was beginning to depend on professional level credentials. Slack expands on this:

> Manifestations of this tendency are clearly found in such areas as the increased number of certification programs and qualification requirements for those who hold office in voluntary organizations, the tendency to appoint paid professional staff "to run" the affairs of these groups, and an increasing standardization and formalization of the systems that constitute this type of organization.[79]

This manifestation of professionalization is a way of privileging access to power and authority for those who are committed to capitalistic market-rational thinking. It supports

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[75] Thibault *et al*, *supra* note 65 at 91-2.
[76] Whitson & Macintosh, *supra* 72; Macintosh & Whitson, *supra* note 13 at 129-130 and, generally, chapters 4 and 9.
[77] Beamish & Ritchie, *supra* note 65 at 64.
[78] Slack, *supra* note 65 at 156 citing Frank Parkin ed, "Strategies of Social Closure in Class Formation" in *The Social Analysis of Class Structure* (London: Tavistock Publications, 1974) at 3.
[79] Slack, *supra* note 65 at 146.

the rationalization of sport and reduces sport organizations' desire or impulse to include other voices which might offer alternative perspectives or simply offer insight into the practical impact of high-performance biased policies at the grass-roots levels.[80]

The social value of the sport administration decreased as the relationships between sport participants and sport administrators became more about setting standards and performing formal roles. Slack writes:

> This increasing formalization of the [PSO] was, in large part, a consequence of the role that parents began to play in the organization. However, not every parent was equally involved. As the organization became more formal, there occurred a definite division between its technical and administrative functions. The type of people who gravitated towards and who were successful in these administrative functions were, in the main, business people. These were the type of people who, because of their experience in the business world, were able to see organizational problems in a rational manner and were able to respond to these problems in a way that was perceived as beneficial to the organization. Evidence of this type of approach was found in increased allocation of responsibilities to committees and the increased "credentialism" associated with being an official …[81]

Slack's description here is helpful because it focuses on the role of parents in relation to sport. It is not controversial to say that parents often volunteer in sports because their children are involved as a way of supporting their children. Slack here is noting that as the roles in the sport organization formalized, simply wanting to support their children was no longer an adequate qualification to be a volunteer. Roles within the sport organization crystallized around certain functions and technical knowledge rather than a more holistic desire to be of service or provide parental support. There is an inherent logic to this development at some level, i.e. those who have some experience or training to perform a role might be better suited for that role than someone who is untrained. This

[80] Green, *supra* note 40 at 921; See also, Stephanie MW Eckert, *High Performance Sport Versus Participatory Sport and Physical Activity: An Examination of Canadian Government Priorities in Bill C-12, the Physical Activity and Sport Act* (Master of Human Kinetics Thesis, University of Windsor, 2010) [unpublished] at 19-20.
[81] Slack, *supra* note 65 at 156.

implicit logic reveals a tendency toward transactional relationships and a prioritization of the system itself. It formalizes the way different rungs of authority relate to one another and organizes those relationships around a system goal, namely: high performance. As one sport scholar noted in 1973:

> Sport clearly has not escaped the powerful thrust of bureaucracy to use the sociological concept that refers to the formalized, hierarchical, rule laden, and efficiency seeking type of social organization the principle prototypes of which are big government, modern business enterprise and the military establishment.[82]

In other words, the professionalization and bureaucratization of sport administration structurally reinforces those same structures which prop up the high-performance bias and are characteristic of rationalization. A bureaucracy, in simplest terms, prioritizes formal relationships and procedural mechanisms. It operates within a transactional flow of power and responsibility and prioritizes the system itself over the humans served and affected.

Sport in Canada in this era becomes about a calculated and scientifically produced effort to win.[83] Sport administration professionalizes and increases its bureaucracy to improve the efficiency of delivery and improve performances. Everything in sport is contextualized with regards to what sort of performance metrics it can increase. In this conceptual shift, however, sport loses access to the people who make it up. It becomes increasingly reliant on answers which support the rationalized system's goals and increasingly dismissive of questions about how to be together. As Mick Green puts it:

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[82] Charles H Page, "Pervasive Sociological Themes in the Study of Sport" in John T. Talmini and Charles H. Page eds, *Sport and Society: An Anthology* (Boston: Little Brown, 1973), 32 cited in Slack, *supra* note 65 at 145-6.

[83] Donnelly & Kidd, *supra* note 53 at 59-60; Cf. Kidd, "The Philosophy of Excellence", *supra* note 12; and Beamish & Ritchie, *supra* note 65 at Chapters 2 and 3.

"At least one effect of this bureaucratic rationalization was to redefine sports issues so that normative questions were/are presented as technical ones…."[84]

2.3.2 Funding

Rationalization also shapes the way funding is delivered in sport so that relationships in sport become transactional and contingent. There are two broad strands worth discussing in relation to funding and the rationalization of sport: (1) which individuals and organizations are funded and how; and (2) what types of programs or initiatives are funded. Unsurprisingly, the rationalization of sport demands that the highest performing athletes and programs or organizations receive funding.

There is a proportional bias toward high performance sport evident in funding patterns during in the 1960s into the 1980s. In 1967, 34% of the government's sport funding went to amateur sport with only 6% going to recreation. In 1970, amateur sport spending jumped by 70% and accounted for 50% of the total spending. Recreation spending also jumped at this point and accounted for 11% of the total spending. In 1971, however, the amateur sport funding accounted for 62% of the total spending that year while recreation was only 34%.[85] These proportions and increases paint a clear picture of how the government wanted to involve itself in sport, namely within the performance-based frame which solidifies in 1972 when the amateur sport budget is 54% of the total funding line and recreation is only 20%.[86] We can add to that data a series of funding programs which were all organized around upcoming Olympic games. "Game Plan '76",

[84] Green, *supra* note 40 at 943.
[85] Table 1-1, Schedule of Federal Funding: Sports, 1967-68 to 1980-81, *A Challenge to the Nation: Fitness and Amateur Sport m the '80s (*1981 white paper), cited in *Dubin Inquiry, infra* note 98 at 13.
[86] Cf. *Dubin Inquiry, infra* note 98 at 13.

"Best Ever '88", and the athlete assistance fund[87] were each designed specifically to improve the chances of athletes to win medals. In fact, "Game Plan '76" was the first time funding allocations for athletes were explicitly linked to their performances relative to international standards.[88] These programs are also haunted by the early political utility of sport as a symbol Canada's national unity and international reputation. "Best Ever '88" channeled development funding to athletes and sports to "capitalize on the 1988 Calgary Games by setting the objective of having Canada's best performance ever in Winter Olympic competition".[89]

It is not, however, just that the federal government clearly prioritized funding high-performance, but the way that funding structured relationships so that sport organizations lost autonomy and their existence became contingent on performance. In 1986, the Sport Marketing Council reported that of the 66 NSOs it interviewed only 15 generated more than 50% of their revenue from non-governmental sources, while most NSOs depended on government funding for between 50% and 85% of their funding and 15 of those received more than 85% of their revenue from the government.[90] Obviously this level of dependence on government funding would render the sport organizations beholden to the government or funding agencies to various degrees thus reducing their autonomy. Beyond simply transfers of money the federal government created dependencies in other ways. It established a centralized office space for national sport organizations and:

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[87] Macintosh *et al*, *supra* note 12 at 83. The athlete assistance fund in 1973 is the precursor to what we now know today as the Athlete Assistance Program or AAP (https://www.canada.ca/en/canadian-heritage/services/funding/athlete-assistance.html) which I discuss more below. The AAP, in present day, is the primary funding mechanism for athletes. It is funding linked exclusively to international or elite levels of competitiveness.

[88] Macintosh *et al*, *supra* note 12 at 140; and Green & Houlihan, *supra* note 65 at 40 and 100.

[89] Sport Canada (1984) *Scorecard*. Ottawa: Fitness and Amateur Sport cited in Macintosh *et al*, *supra* note 12 at 141.

[90] Macintosh & Whitson, *supra* note 13 at 20-1.

> took day-to-day direction and administration away from volunteer executives, and often from the geographical centres of their sports, and brought them within the compass of federal bureaucracy. It created a new class of professional administrators whose ties, by class position, by educational background and by occupational experience, are closer to government officials than to the athletes, coaches and clubs whose interests they nominally represent.[91]

Kidd goes on to say that by making such changes "… the state has virtually destroyed the traditional autonomy of amateur sport. Sport Canada now sets the objectives and evaluative measures for sport, provides the bulk of administrative and programme funds at the national level…"[92] Because the funding flowing from the federal government in this era was increasingly tied to performance standards while at the same time it was the main source of funding flowing to specific sports at all, the very autonomy and existence of sport organizations became increasingly tied to the performance of its athletes at international competitions.[93]

Individual athletes faced a similar level of contingency and dependence in this period as well. Beamish and Borowy argue that: "The period between 1973 and 1976 represents the first steps towards the contracting of athletes' specialized capacity for performance."[94] The terms of these early contracts between athletes and Sport Canada

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[91] Kidd, "Dilemma", *supra* note 31 at 364.

[92] *Ibid*.

[93] Green & Houlihan, *supra* note 65 at 41-43:

> The federal government committed $CAN25 million for 10 winter Olympic sport organisations to ensure that Canada would have a 'Best Ever' performance in 1988. However, this financial commitment had a caveat. The 10 NSOs were required to develop four-year plans 'to improve their technical and administrative capacities to produce better high-performance athletes'. These four-year plans, known as the Quadrennial Planning Process (QPP), required NSOs to identify performance targets and to specify the material and technical support systems (from training camps and centres of excellence to coaching and paramedical arrangements and research programmes) necessary for the achievement of each set of targets. Moreover, this increasing growth in federal grant-aid to NSOs also included monies direct to elite athletes through the Athlete Assistance Programme (AAP), which was managed by Sport Canada and which further marginalised the National Fitness and Advisory Council and with it an independent voice for sport…

See also: Macintosh *et al*, *supra* note 12 at 105; and Green, *supra* note 40 at 932.

[94] Beamish & Borowy, *supra* note 72 at 8.

and the Canadian Olympic Association explicitly contemplated specific levels of performance in exchange for funding and created obligations on the athletes to "contribute to their sport when and as requested…"[95] In 1977 the AAP formalized the "Athlete/National Sport Organization Agreements" whereby athletes and Sport Canada where contractually bound to one another.[96] The most recent model version of the Athlete/NSO Agreement is between the athlete and the NSO specifically and places heavy obligations on the athletes including relocation requirements as well as a mandatory training program. It would not be an exaggeration to say that this control exerted over athletes is tied to an implicit understanding of them and their sport programs as a kind of investment in the national identity and reputation their performances might produce which ties this example of rationalization into the political utility of sport leveraged by politicians in the 1960s and early 1970s.[97]

Bill Crothers' testimony from the *Dubin Inquiry*[98] give us a further window into the way the funding shaped the lives of the athletes in amateur sport.[99] Crothers characterizes the opportunity for material benefit as "insidious".[100] To him, funding and financial incentivization more broadly creates the conditions for cheating. The insidiousness of money in amateur sport is that it is of a limited supply in a high demand market and structurally encourages athletes to pursue excellence through any means necessary.

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[95] Health and Welfare. "Memorandum to grants-in-aid student-athletes," (Ottawa: Government of Canada, 1973) cited in Beamish & Borowy, *supra* note 72 at 11
[96] Beamish & Borowy, *supra* note 72 at 17.
[97] Canadian Heritage, "Athlete Assistance Program Policies and Procedures - Appendix C: Model Athlete/National Sport Organization (NSO) Agreement Annotated (April 2023)", Ottawa: 2023: Government of Canada: https://www.canada.ca/en/canadian-heritage/services/funding/athlete-assistance/policies-procedures.html#a18.
[98] Canada, *Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance* (Ottawa: Government of Canada, 1990) (Commissioner: Charles L Dubin). [*Dubin Inquiry*].
[99] *Ibid* at 475-6.
[100] *Ibid* at 475.

While Crothers criticizes funding as a carrot, Bruce Kidd notes the degree to which funding and the revocation thereof can be used as a stick. In the passage below he explains how the relationship between athletes and their coaches changed once the Canadian government began to attach funding to high-performance participation. Kidd writes:

> In the amateur era, when a coach or official wanted an athlete to devote more time to training, she/he had to employ normative controls and appeal to beliefs that the athlete had internalized, such as loyalty to the team. Such appeals usually were effective, because most athletes shared the coach's ambitions and expectations about behaviour, but if the athlete was not convinced, she/he could have ended the relationship and moved to another club. In an individual sport, she/he could have competed as a self-trained 'unattached' athlete. She/he had no material interest in sport and pursued it as a form of leisure. But with state incentives and contracts, the national coach has recourse to the utilitarian and instrumental controls characteristic of wage labour. To be sure, she/he will use normative controls as much as possible, but when all else fails, she/he can enforce behaviour by invoking the contract and the power to penalize the athlete and withdraw benefits.… Elsewhere, I have argued that the conditions of athletic labour in the Olympic sports in Canada meet the legal test of employment. In effect, most Canadian athletes have become state professionals. As underpaid professionals – Sport Canada remuneration is less than the minimum wage – Canadian athletes are 'sweat-suited philanthropists', ensuring the careers of hundreds of well-paid coaches, sports scientists and sports administrators, and subsidizing the ambitions of the federal state.[101]

Kidd's words here emphasize how the introduction of funding to amateur athletics complicates the relationships between athletes and their coaches as well as their governing bodies and the government itself. Most notably this relationship becomes a contractually defined transaction wherein the athletes provide athletic efforts and follows the 'rules' in exchange for funding from the government.

Thus, the deep prioritization of performance comes at a cost. It shifts the focus of sport away from an activity with intrinsic rewards into a task done for the sake of extrinsic compensation. Organizations must make decisions which are rationally

[101] Kidd, "Excellence", *supra* note 12 at 381 (Citations omitted).

constrained toward achieving performance standards rather than making policy adjustments which might directly impact their specific sport communities. In ways that echo the implications of professionalization, funding allocations which prioritize high-performance overtake "regional and/or provincial/territorial interests in sport and physical activities, as well as wider (but interrelated) social policy concerns (e.g. equity, gender and official languages)."[102] Kidd describes the culture of sport at this time as an "ideology of excellence".[103] He writes:

> The ideology of 'excellence' has only been fashioned and spread during the last 25 years, in the course of the construction of a state-directed system for high- performance sport. During that time, federal and provincial governments, often at the instigation of Olympic leaders, have created elaborate mechanisms for the training and support of what are often referred to as 'elite' athletes…To encourage athletes to devote as much time as possible to sport, they have created an ambitious financial incentive scheme. Under the federal Athlete Assistance Program (AAP), an athlete achieving a ranking in the top eight in her/his event in the world earns an 'A' card, which pays US$650 per month basic stipend plus allowances for special training, day care, special equipment, moving and travel expenses, facility rentals, and university or college tuition, books and instruments. Sport Canada mails the cheques directly to athletes.[104]

He goes on to explain that although initially there was some sense among Canadian sport participants that sport was about personal development in this period of expanded funding and high-performance focus:

> the COA and the state agencies soon abandoned even the rhetoric of 'personal growth', transforming 'excellence' into a vocabulary for performance incentives and strict controls. To protect 'standards', they said, they could only fund programmes that resulted in medals and records. It was not only the athletes who were required to keep winning to maintain funding, but sports governing bodies, coaches and administrators, and even Sport Canada itself.[105]

[102] Green & Houlihan, *supra* note 65 at 97.
[103] Kidd, "Excellence", *supra* note 12 at 374.
[104] *Ibid* at 374-5 (Although this article was re-published in 2013, Kidd explains in the abstract that he wrote it before the 1988 Olympics).
[105] *Ibid* at 379 (Citations removed).

Therefore, these rationalized funding mechanisms in sport pressured the entire sport system to provide *excellent* performance which was valued symbolically by the government in terms of the reputational appeal for Canada but also valued financially in terms of financial support. In other words, the goals related to human needs are sacrificed in furtherance of high-performance outcomes which serve the system itself, but money, alone, is not necessarily the problem in sport.[106] It is the transactional nature and the systemic commodification of personal sacrifices of athletes and the capacity of sport organizations to push their athletes for performances that ultimately produces the pressurized ecosystem which gives way to the use of performance enhancing drugs and maltreatment.

2.3.3 High-Performance Sport vs. Mass Participation vs. Recreation

Embedded in the trajectory of rationalization in sport is the tripartite discourse around high-performance sport, mass participation, and recreation. The entry point into this discussion is that the federal government understands sport *as high-performance sport*, so when it is funding sport it is always already funding sport in this narrow lane and with a definitionally limited set of elite participants. Mass sport participation, in contrast, refers to sport funding that prioritizes access for participants in a broad way where participation of many people not their individual outcomes or performances is the goal of the funding. Recreation is, then, an even broader category than mass participation in sport. Recreation can include a wide variety of activities which may or may not be organized sports in a formal sense, i.e. community group fitness classes as well as community softball leagues could both be found under a recreation heading but neither

[106] Beamish, *supra* note 65 at 134.

would likely be included in the federal government's definition of sport. The federal government's relationships to each of these three funding buckets re-emphasizes a general predilection toward rationalistic measurable outcomes over more holistic program building.[107]

It is probably true that recreation and mass sport participation were unlikely *ever* to be high priority for the federal government given that, in part, the federal government assumed it could never squeeze much "political pay-off" out of these kinds of programs.[108] Presumably, the relative fitness of the average Canadian is not as internationally commendable as Olympic gold medals. Not to mention that the constitutional complexities associated with sport would require significant effort to thread the needle of jurisdictional responsibility.[109] Eventually, in the 1980s, the federal government made it clear that it would *not* be taking responsibility with regards to recreation and signed two agreements with the provinces and territories declaring the same. The first was the *High Performance Athlete Developing in Canada* agreement and the second was the *National Recreation Statement*, signed in 1987.[110] In the earlier agreement, the responsibility of developing elite athletes was shared while in the latter agreement the provinces and territories assumed almost all responsibility for recreation.[111] This explicit eschewing of responsibility supports the underlying rationalization of the federal government's sport system which wants to avoid

[107] Donnelly & Kidd, *supra* note 59 at 64.
[108] Macintosh *et al*, *supra* note 12 at 73.
[109] Macintosh *et al*, *supra* note 12 at 73; Cf. Harvey, *supra* note 32 at 38-39.
[110] Harvey, *supra* note 32 at 49.
[111] *Ibid* at 49-50.

"squandering" funds on mass sport so that they can "be more efficiently concentrated on fewer individuals who had been identified as being potentially successful".[112]

This is not to say that the government did not create programs related to participation and recreation. The point here is that sport was understood in this siloed and constrained way as only about creating excellence and establishing a high-performance system whereas participation and recreation were not directly sport issues but under the ambit of health.[113] The prioritization of high-performance over mass sport participation and recreation points to the rational individualistic emphasis in the way the federal government funds sport. The funding structures and strategies discussed in the last sub-section engage this individualism but the juxtaposition of high-performance against mass participation makes it even clearer. As Donnelly and Kidd point out, by focusing resources on elite athletes the federal government perpetuates a myth inherent to "neoliberal capitalism" that "individual effort will lead to success" notwithstanding the obvious reality that only a few athletes are elite and that, for the most part, they come from higher socioeconomic statuses.[114] In other words, the government's choice to focus on high performance tautologically reenforces the narrative that resources ought to go to the highest performers because they yield the highest performances. It does not substantively account for external social variables beyond past athletic achievement and further privileges the privileged.[115] It reveals an incapacity to understand sport and success in sport in ways oriented around supporting the conditions for collective activity.

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[112] Donnelly & Kidd, *supra* note 107 at 61.
[113] Marion Menard, "Policy Framework for Participation and Excellence in Sport (Background Paper)" (Ottawa: Library of Parliament, 2020) at 6.
[114] Donnelly and Kidd, *supra* note 107 at 64.
[115] *Ibid* at 65.

Rather than relying on a debunked theory that investment in high-performing individuals will "trickle down" to participatory sport[116], the government could be leveraging resources to create the conditions for participation in sport in a broad way oriented toward community building, health, and wellbeing.[117] Ultimately, we can see here how the federal government prioritizes system goals over and against human needs in a way that manifests as the rationalized focus on high-performance outcomes.[118] I want to underline the way in which this understanding of sport emphasizes individuals and individual success instead of focusing on inclusion and the social networks which might make that success possible. Although this juxtaposition also exists in the professionalization of sport and sport funding strategies it is quite obvious in the decision to focus on high-performance in lieu of mass participation.[119]

2.3.4 Summary and a Look Forward

The first part of this chapter outlined the politicization of sport and the rationalized focus on high-performance in the delivery and administration of sport policy. The big takeaway is that sport in Canada was structured in such a way that it reflected the values of rationalization, namely: individualism, transactionalism, and instrumentalism. Most of the relationships in sport between the mid-1960s and late 1980s were based on funding incentives. The federal government was not taking responsibility for the activity of sport or the shape of its delivery. Instead, it was incentivising individualized achievement and

[116] Donnelly and Kidd, *supra* note 107 at 64.
[117] For a discussion of how the high-performance emphasis neglects established Canadian values see, Eckert *supra* note 80 at 24-25.
[118] Green, *supra* note 40 at 945.
[119] It is also telling that the federal government separates high-performance sport from health-related outcomes. I will discuss this more below in relation to the government reshuffle in 1993 which solidifies this siloed categorization.

celebrating the notoriety it brought to the Canadian identity. Sport became identified exclusively with high-performance or elite sport.

This development comes to a head in 1988 when Benjamin Johnson fails a drug test, and Canadians begin to realize that this focus on high-performance and excellence was not a simple expression of pure sport and personal achievement.[120] Rather, there was something insidious lurking in the background. In the next part of this chapter, I review the fallout of Johnson's failed drug test including the *Dubin Inquiry* and some of the academic literature which offers a critique of the high-performance culture in Canada after the *Inquiry*. It is important to see how the facts surrounding Johnson's failed test relate to the rationalized sport culture being pushed to its *rational though problematic* conclusion, i.e. in the singular pursuit of athletic glory the preservation of bodily wellbeing and moral values diminish in importance.

2.4 The Dubin Inquiry

As I write this thesis the country is slowly learning some details about the Future of Sport Commission[121], which, although not an official public inquiry, would be the second federal examination of sport. In light of that we should consider a passage from the *Dubin Inqiury* which pointed to the same issues we are dealing with today:

> Although the task force reports and government responses acknowledge the broad objectives set forth above and the benefits of wide-based

[120] Green, *supra* note 40 at 932ff.

[121] Canada, Canadian Heritage, "The Future of Sport in Canada Commission: Terms of Reference" (Ottawa: Government of Canada, 2023) [accessible here: https://perma.cc/4BN9-24NY] [last accessed on May 27, 2024]); Heritage Canada, "Backgrounder: The Future of Sport in Canada Commission" (Government of Canada, https://www.canada.ca/en/canadian-heritage/news/2023/12/backgrounder-the-future-of-sport-in-canada-commission.html [last accessed on April 3, 2024]. For an earlier announcement of a possible public inquiry into sport see: Jamie Strashin and Lori Ward, "Athlete representation, financial transparency among changes to national sports system", *CBC Sports*: May 10, 2023: https://www.cbc.ca/sports/safe-sport-federal-government-announcement-1.6838387; See also Canada, The Canadian Standing Committee on the Status of Women, *Time to Listen to Survivors: Taking Action Towards Creating a Safe Sport Environment for All Athletes in Canada*, (Ottawa: The Canadian Standing Committee on the Status of Women, 2023) (Chair: Karen Vecchio) at Recommendation 14.

> participation in sport, in fact government support of sport, particularly since the mid-1970s, has increasingly been channelled towards the narrow objectives of winning medals in international competition. Notwithstanding protestations to the contrary, the primary objective has become the gold medal.[122]

I demonstrate below that the *Dubin Inquiry* helps us to see the similarity between the then and the now. By examining the findings of the *Inquiry* to what we are faced with today we can see what Beamish calls the "the hard-as-steel grip in which instrumental rationality holds the modern world".[123] We can see that the same logic of bodily sacrifice in the name of athletic glory that makes it rational (though not morally permissible) to use performance enhancing drugs is the same logic that normalizes the diminished importance of wellbeing and ignores abuse today. In both scenarios we are taking about a culture which prioritizes winning and performance over all else.

2.4.1 The Dubin Inquiry

After winning a gold medal in the 100-meter dash Benjamin Johnson tested positive for performance enhancing drugs at the Seoul Olympics in 1988. In response, the federal government ordered an inquiry into the use of banned substances in Canadian sport commonly referred to as the *Dubin Inquiry.* Robin Beamish describes it as, "one of the most systematic and thorough analyses of Olympic sport ever conducted".[124] Dubin's findings were released in 1990, and its completeness and notoriety make it an important landmark in the development of Canadian sport policy. The report contains 26 chapters

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[122] *Dubin Inquiry, supra* note 98 at 64.

[123] Robin Beamish argues that "the real Achilles heel of the [*Dubin Inquiry*] was the extent to which it … underestimated or failed to recognize the hard-as-steel grip in which instrumental rationality holds the modern world". Beamish's phrase the "hard-as-steel grip of instrumental rationality" is an allusion to Weber who posited that modernity reflected the gradual increasing rationalization or reliance on instrumental reason. (*supra* note 65 at 141).

[124] Beamish, *supra* note 65 at 121; See also 127: the Inquiry "began on 15 November 1988 and extended to 3 October 1989, involving 119 witnesses and 295 exhibits, a staggering 86 volumes with 14,817 pages of transcripts and 26 additional briefs submitted by the public". The final report is 580 pages long with several appendices.

and lists 70 recommendations – beginning with a call to follow specific principles for re-building the moral foundation of sport not simply improving its organization effectiveness.[125] It begins with a historical overview of the government's involvement in sport and sport policy dynamics more broadly and ends with an extended reflection about the rights of athletes as well as the ethics and morality in sport. Between these two portions are several chapters about the science of performance enhancing drugs, contemporary policy structures, details about performance enhancing drug use in weightlifting as well as track and field in Canada. Much of the material about these specific sports is supported by direct evidence given by the athletes and coaches involved. We can use the *Dubin Inquiry* to look at the state of the culture in Canadian sport at the end of the 1980s as a way of understanding what that culture meant to the people whose lives and relationships it shaped.

Dubin aims to do more than just inquire into *who* is responsible for the rampant use of performance enhancing drugs in Canadian sport. He wants to see *why* so many people made the same dangerous and unethical decision to use the drugs. To put it frankly: what are the conditions in sport such that using PEDs was on the menu to begin with? Dubin writes:

> The Commission spent considerable time in considering who should be held responsible for the use of drugs in sport. The athletes who cheat must, of course, bear their full share of responsibility, but the responsibility cannot be solely theirs. I therefore inquired into the circumstances that gave rise to the use of drugs, particularly anabolic steroids, by athletes, and the responsibilities of the self-governing sport federations, national and international, and of coaches, physicians, and others who were involved in the administration of athletic programs.[126]

[125] *Dubin Inquiry, supra note* 98 at 527.
[126] *Ibid* at 65.

It is important to see that he clearly understands that the culture of sport is at issue *because* it has systemic effects on athletes, their lives, and their choices. He writes:

> … Canadians must re-create the moral basis of sport. We must examine to what extent our expectations of our athletes have contributed to the current unacceptable situation in sport in Canada. We must examine, too, whether the programs supported by the federal government have contributed to the problem, and indeed whether the funds provided by the government are being utilized in a manner consistent the fostering of those values and ethics which are so important us as Canadians.[127]

Dubin's analysis, therefore, shifts away from specific bad-actors and specific instances of cheating toward the system and contexts which create space for and, in some cases, encourage cheating. He highlights the disconnect between what the federal government says it values and the practices it pursues which demands we question the meaning of government's rhetoric in light of the exposed practices, e.g. performance enhance drug use and, it must be said, maltreatment.[128]

The *Dubin Inquiry* is not just about sport being subtly invaded by capitalism and the market economy – although it was. The problem is that organizing relationships in sport around high-performance as if it is simply a fungible commodity reduces our view and understanding of the humans and human needs involved in sport. It emphasizes a transactional understanding of how humans relate to each other and to systems and renders banal personal sacrifices of athletes. Dubin summarizes the testimony of the weightlifters examined for the Inquiry:

> The weightlifters explained their actions in two parts: first, all of them were involved almost full time in their weightlifting careers and were dependent on the Government of Canada for financial support; second, from their experience in international competition for many years, they all believed that weightlifters in other countries used steroids and thus they could not compete successfully without using steroids too. They complained that the standards set to qualify for funding from the Government of Canada were related to world standards which, in their view, were inflated standards set by those who had been using steroids.

[127] *Dubin Inquiry, supra* note 98 at 512.
[128] Beamish, *supra* note 65 at 128-133.

> The athletes asserted that, to receive funding, they had to meet those artificial standards and the only way to do so was by the use of anabolic steroids…
>
> All the athletes admitted that the steroids were invaluable to them in increasing their performance. Some of them regarded steroids as miracle drugs. It was their view that being subjected to drug tests was unfair, that somehow they had the right to compete, to travel around the world for training and competition, and to receive government funding, all the while using steroids to increase their performance. Indeed, many of them were puzzled why they were being deprived of funding even after detection and disqualification…
>
> …The demoralization of these young men was apparent. On this issue, they had no sense of moral or ethical values. Cheating had become an acceptable way of life, and they were satisfied they were right to conduct themselves as they did. Weightlifting had become something of a cult, and taking steroids a part of the culture. They practised six or seven days a week, enjoying the camaraderie and the opportunity to visit many places throughout the world. They were so desperate to preserve their secret that the idea of bribing an official of Sport Canada readily came to mind. In addition to the dangers associated with the drugs themselves, they risked infection or even more serious harm by resorting to the sordid conduct of urine substitution in order to avoid detection.[129]

We can see in this passage the degree to which the use of steroids was trading off against other values and priorities. The athletes explicitly saw their ability to compete as tied to engaging in dangerous behaviors like taking performance enhancing drugs and urine injections. It is not only remarkable that these athletes took steroids but that the culture of their sport was such that cheating and covering it up was a normalized consideration – to the extent that high level officials in the sport supported them in attempted coverups.[130]

The track and field athletes and coaches who participated in the Inquiry expressed similar sentiments insofar as steroid use was understood to be a sufficient condition to receiving government funding.[131] Dubin's summaries give the sense that taking PEDs was seen as the price of admission or a necessary evil to compete internationally. What is remarkable however is the degree to which high performance results effectively protected users of PEDs from investigation. Because the National Sprint Centre, where Charlie

[129] *Dubin Inquiry, supra* note 98 at 146-7.
[130] *Ibid* at 139-143.
[131] *Ibid* at 228, 243 and 271.

Francis coached and Ben Johnson trained, produced such high-level athletes the Canadian Track and Field Association neglected to investigate it – even after repeated warnings from other coaches and stakeholders.[132] The President of the CTFA, at the time, even went so far as to imply that until there was hard evidence of PED use the concerned coaches should, perhaps, try to emulate whatever Francis was doing to produce such great athletes.[133]

Sport scholars commenting on the *Dubin Inquiry* agree that the problems it reveals about the culture of sport were, to some degree, overshadowed by its descriptive and narrative focus on who knew what when. Macintosh and Whitson, following Bruce Kidd, recognize a need to broaden our focus to the entirety of the system of sport:

> Yet there is an important sense, noted by former Olympian Bruce Kidd (1988), in which this determination to punish guilty individuals avoided discussion of our collective responsibility for this sort of sorry event. The focus on who did what and knew what in the Dubin inquiry served to deflect attention from the extent to which Ben Johnson and the other Canadian throwers and weight-lifters who had been caught out on drug tests were products of the system we established and the messages we consistently gave them.[134]

Similarly, Beamish and Ritchie write:

> The arbitrary focus on selected banned performance-enhancing substances has a second consequence. It deflects attention from the wider question of high-performance sport as a set of social practices. As nation states, commercial interests, sport administrators, coaches, sport science experts, and individual athletes have engaged in the unrelenting pursuit of the linear record and pushed human athletic performance to its outer limits, the activities themselves have become questionable…
>
> From within the system of high-performance sport, the longer one pursues a top three finish in the world and the closer one is to reaching the podium, the less and less easy it is to distinguish between health and pathology.[135]

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[132] *Dubin Inquiry, supra* note 98 at 177-213.
[133] *Ibid* at 201.
[134] Macintosh & Whitson, *supra* note 13 at 136 citing Bruce Kidd "What happened to amateur sport?" Special to *Globe and Mail*, October 1, 1988, D1, D8.
[135] Beamish & Ritchie, *supra* note 65 at 142-3.

This criticism will ring even truer in the next chapter in which I discuss the blind spots of truth-seeking systems which are overshadowed by liability and blame. Nevertheless, the *Dubin Inquiry* does provide evidence of a recognition that the sport system contributes to the decisions of some athletes and coaches to use performance-enhancing drugs. This recognition, in turn, begins to undermine the push by the federal government toward winning at all costs, and, as Dubin points out, it signals a need to reconsider the values and priorities in which that system is grounded.[136]

Bruce Kidd, for his part, denies that we ought to return to the values of ancient Greece in the way that Dubin seems to.[137] Referring to the motto of the modern Olympic games, Kidd writes:

> The time has come to abandon *citius, altius, fortius,* 'no pain no gain', and other slogans that uncritically encourage the domination of nature, including ourselves. They help perpetuate the worst excesses of the Enlightenment legacy – the idolization of the performance principle, the wasteful subjugation of the environment, the medicalization of the body… In such an environment, athletes are continually expected to 'pay the price' in the form of physical sacrifice and the postponement of choices outside of sport. It is these conditions – and not any abandonment of ethical values in the abstract – which have created the 'moral crisis' in sports.[138]

In agreement with Kidd, Beamish and Ritchie suggest that a key to avoid repeating the mistakes of the past is to "make the socio-historical reality [of sport] central to all discussion about the future of world-class sport."[139] It is not, in other words, about returning to nostalgic values of the ancient world but about coming to terms with the structural forces at issue in sport and the effects they can have on those who participate. It

[136] Cf. Green & Houlihan, *supra* note 65 at 44.
[137] See *Dubin Inquiry, supra* note 98 at 502.
[138] Kidd, "A New Orientation", *supra* note 65 at 467.
[139] Beamish & Ritchie, *supra* note 65 at 144.

is about taking a true accounting of the values which underly the sport system and practices those values allow and, in some cases, require sport participants to pursue.

We should take note that the structural relationships which contributed to the use of PEDs in Canada in the 1970s and 1980s are not exclusive to PEDs. They simply create a culture in which PEDs *may* be used, but it is a culture which permits conduct otherwise thought immoral or unfair. This same culture persists today in sport because of, as Beamish says, "the hard-as-steel grip in which instrumental rationality holds the modern world".[140] That is to say that the rationalization which induced sport culture to focus almost exclusively on high-performance and thus precipitated the use of performance enhancing drugs can be said to be the same origin for a culture which normalizes the harm of athletes for the sake of improved performances.

2.4.2 Fall Out from Dubin Inquiry and Looking Ahead

To quickly capture a sense of how the federal government responded to the *Dubin Inquiry* we can compare *Toward 2000: Building Canada's Sport System*[141]*,* released one month *before* Benjamin Johnson's failed drug test to *Sport: The Way Ahead*[142] which came out in 1992 *after* the *Inquiry*.

Toward 2000 is clearly animated by the rationalization of sport and explicitly states that the federal government's relationship to sport should be akin to a business producing high-performance.[143] One commentator describes the report as:

> a jargonistic discourse on the management objectives of the corporate activity of high-performance sport. In *Toward 2000* sport is rarely

[140] Beamish, *supra* note 65 at 141.
[141] Canada, Fitness and Amateur Sport, *Toward 2000: Building Canada's Sport System* (Ottawa: Task Force on National Sport Policy, 1988) (Cochairs: Lyle Makosky and Abby Hoffman) ["*Toward 2000"]*; Cf. John Barnes, *Sports and the Law in Canada,* 3rd ed. (London, Butterworths: 1996) at 632.
[142] Canada, Minister's Task Force on Federal Sport Policy, *Sport: The Way Ahead* (Ottawa: Minister of Sport, 1992) (Chair: JC Best) ["*The Way Ahead*"].
[143] Barnes, *supra* note 141 at 630.

> projected as a moral or educational activity. Before Seoul and in the general spirit of the 1980s, sport was a matter of system setting, financial planning and goal achievement.[144]

As this description suggests, *Toward 2000* does reflect the federal government's deep adherence to and faith in the system and pursuing the system's goals of high-performance and excellence.[145] Although there are some sub-goals and *pieces* of recommendations which purport to increase participation and access, *Toward 2000* really envisions a Canadian sport system which operates transactionally and in which the administrators are highly regimented and controlled and athletes are streamed early into specific sports and funded in connection with their international standings.[146]

Toward 2000 reflects the values of burgeoning neoliberalism and paints a picture of the culture of sport at the time directly before the *Inquiry*.[147] The Conservative government in the 1980s declared that by 1985 all national sport organizations would need to secure 50% of their funding from private companies.[148] And in the 1990s they threatened to defund sports not making certain high performance thresholds.[149] This kind of policy is representative of a government attempting to increase the access of the private market to sport and encourage sport to become more entrepreneurial rather than reliant on the government both of which resonate with the fundamental premises of neoliberalism.[150] Although this policy did not remain in place after the Liberals came

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[144] Barnes, *supra* note 141 at 631.
[145] *Toward 2000*, *supra* note 141 at 6.
[146] Beamish & Borowy, *supra* note 72 at 24: The authors support the notion that the relationships between athletes, the government, and the national sport organizations was becoming increasingly contractual. This culminated in 1973 with the introduction of formal contracts between the three parties.
[147] Kean Birch and Matti Siemiatycki, "Neoliberalism and the Geographies of Marketization" (2015) 40:2 Progress in Human Geography 177.
[148] Church, *supra* note 12 at 103 citing Ministry of State, Fitness and Amateur Sport, *Sport Canada Contributions Program 1986-1987* (Ottawa: Government of Canada, 1985).
[149] Thibault & Harvey, *supra* note 31 at 19.
[150] David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005) at 2:

back into power, it is not that dissimilar in effect from the kind of direct investment in high-performance outcomes discussed above. In both cases, we see funding contingent on performance. The differences lie in that under the Liberals, sport functioned under an economy defined by *public* dollars for performance, whereas under the Conservatives the implication was that good performances and high popularity could lead to *private* dollars.[151]

After the *Dubin Inquiry*, we see a shift in the federal government's rhetoric around sport and how the sport system should be understood. *The Way Ahead* prioritizes questions about the values in sport.[152] Echoing Dubin to some degree, Green and Houlihan point out that the questions it asks

> characterise debates surrounding competing philosophies, values and belief systems of key actors in the Canadian sporting community and the role that such values and belief systems might play in contributing to elite sport policy change. What is clearly underlined here is that the issue is not just about funding allocations; rather it is also one of priorities and political will.[153]

> Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices. The state has to guarantee, for example, the quality and integrity of money. It must also set up those military, defence, police, and legal structures and functions required to secure private property rights and to guarantee, by force if need be, the proper functioning of markets. Furthermore, if markets do not exist (in areas such as land, water, education, health care, social security, or environmental pollution) then they must be created, by state action if necessary. But beyond these tasks the state should not venture. State interventions in markets (once created) must be kept to a bare minimum because, according to the theory, the state cannot possibly possess enough information to second-guess market signals (prices) and because powerful interest groups will inevitably distort and bias state interventions (particularly in democracies) for their own benefit.

[151] Cf. Thibault & Harvey, *supra* note 31 at 19: The Liberals implemented the Sport Funding Accountability Framework or SFAF which did not defund sports based on poor performances, but it did, in part, allocate future funding based on past performances.

[152] Green & Houlihan*, supra* note 65 at 44.

[153] *Ibid*.

The Way Ahead explicitly recommends that there be more attention placed on the ethical practices in sport.[154] In contrast to previous reports it contains values to be embedded into the sport system and sport policy:

> Sport is about fellowship and fairness and generosity to others, about learning, about testing oneself, about excellence, about winning.[155]

We cannot ignore the inclusion of the principles of winning and excellence, but the values which come first in this list are certainly less likely to "present [athletes] with ethical dilemmas in their quest for excellence".[156] As Green and Houlihan put it, "What is clearly underlined [in *The Way Ahead*] is that the issue is not just about funding allocations; rather it is also one of priorities and political will.[157] Thus, following the *Dubin Inquiry* it seems as though the federal government is poised to make important changes the way sport functioned.

In large part, however, the aspirations of *The Way Ahead* did not take hold.[158] This is possibly due to Prime Minister Kim Campbell's decision to reorganize the government in 1993 so that Sport Canada became part of Heritage Canada and, now defunct, Fitness Canada became part of Health Canada.[159] Green and Houlihan surmise that "the 1995 referendum in Québec, which resulted in a close decision against Québec separation from Canada; the weakness of the economy; and the election of the cost-cutting government of Liberal Prime Minister Jean Chrétien" also contributed to *The Way*

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[154] *The Way Ahead*, *supra* note 142 at 178-9.
[155] *Ibid* at 39.
[156] *The Way Ahead*, *supra* note 142 at 57.
[157] Green & Houlihan, *supra* note 65 at 44.
[158] Green, *supra* note 40 at 933; Beamish, *supra* note 65 at 140-1.
[159] See Church, *supra* note 12 at 125 and 128; See also Thibault & Harvey, *supra* note 31 at 19.

Ahead not gaining momentum.[160] Instead, the federal government continued to shape and understand itself around producing high-performances.

Although the overall policy thrust of the federal government remained high-performance focused, there were a few ethics-based initiatives to come out of the *Dubin Inquiry*. In 1991 the federal government established the Canadian Anti-Doping Organization which was quickly renamed the Canadian Centre for Drug-Free Sport and later merged with Fair Play Canada in 1995 to become, what is now, the Canadian Centre for Ethics in Sport (CCES).[161] The *Dubin Inquiry* did, therefore, encourage the sport ecosystem to expand its reflective capacity and think more broadly about the values in sport – even though the federal government was not funding sport in a way which demonstrated this reflection.

The *Dubin Inquiry* shined a spotlight on high-performance sport culture and forced Canada to come to come terms with the pressures and lived experiences of its athletes. It thereby encouraged Canada to look at values underlying sport and decide if they needed to be changed. The *Inquiry* is a threshold moment because it offered the Canadian government and the Canadian sport community an opportunity and justification to change course. Instead, what we will see is that the forces of rationalization remained in control. Thus, sport remains, even today, confronted by the same cultural problems today as it was in 1988, namely: a system that normalizes the disposal or instrumentalization of people in the name of that system's own goals necessarily does not leave room for caring about those people.

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[160] Green & Houlihan*, supra* note 65 at 44 citing Jean Harvey 'Sport and Quebec nationalism: ethnic or civil identity?' in J Sugden & A Bairner eds, *Sport in Divided Societies* (Aachen: Meyer and Meyer, 1999) 31– 50.
[161] Church, *supra* note 12 at 126; and Thibault & Harvey, *supra* note 31 at 19.

2.5 Sport in Canada Post-*Dubin Inquiry*

In this final section, I argue that after the *Dubin Inquiry* the policy rhetoric around sport shifts to include notions of ethics and morality in sport as well as a renewed interest in participation in sport as a governmental goal, but this rhetoric does not yield action in terms of funding or programming change. Instead, we see the forces of rationalization continue and potentially intensify. Rationalization in this era manifests most notably in the creation of Own the Podium. The culture of the system itself remains in the *grip* of rationalized high-performance objectives. The spotlight has shifted today so that the country's conscience is focused on the abuse of athletes rather than the use of performance enhancing drugs, but the connective tissue between the *Dubin Inquiry* and the maltreatment problems we face today is a culture that continues to deprioritizes creating the conditions for human wellbeing and emphasizes high performance often in terms of an explicit exchange for health and safety.

Because this final section covers large period of time (effectively 1992 until 2023) it is helpful to focus on some specific moments and events which are particularly relevant.[162] My goal here is not to exhaustively list all of the evidence that this period continued to rationalize in the same way as the era before. Rather I want to focus on some key examples of that rationalization.

2.5.1 Canadian Sport Policy 2002-2023.

There is a vivid tension between the content of the two released iterations of the Canadian Sport Policy in 2002 and 2012 as well as the discussion paper for the third[163]

[162] For a comprehensive table of these kinds of events until 2013 see Thibault & Harvey, *supra* note 31 at 21-25.
[163] As of writing CSP 2023 has not been released: Sport Information Resource Centre. *Canadian Sport Policy Renewal (2023*-2033*),* Ottawa, SIRC, 2023 [accessible here: https://sirc.ca/canadian-sport-policy-3-0-renewal/].

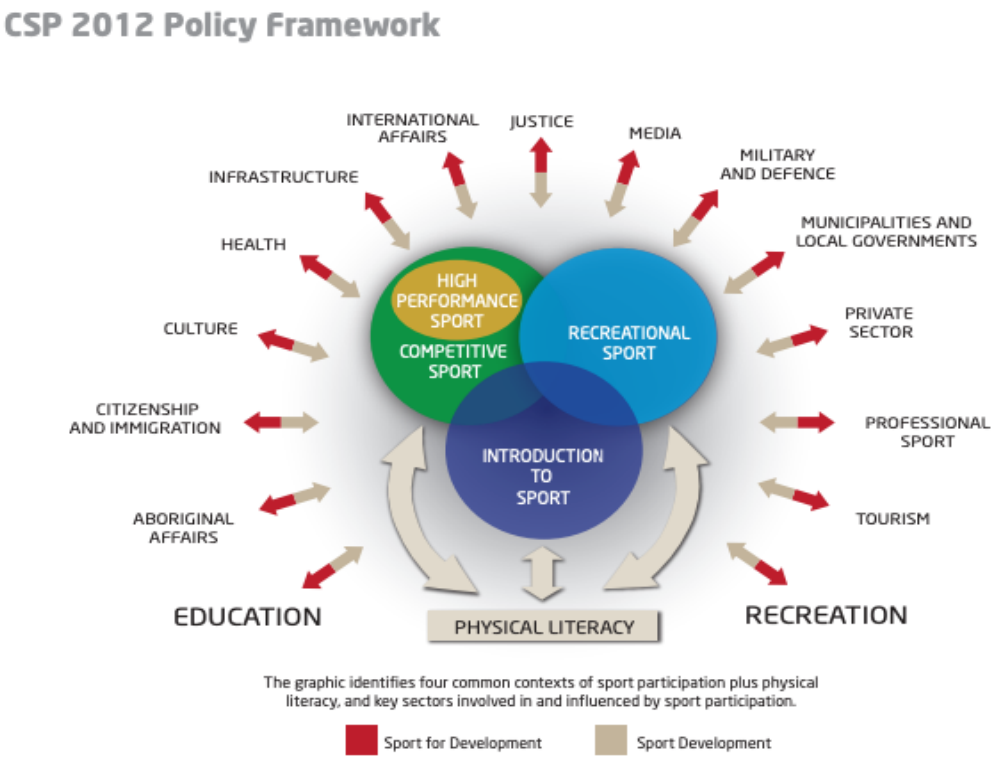
and the actual policy decisions made by sports organizations and Sport Canada. Although the CSP attempts to provide a national framework for sport stakeholders and make clear what values and priorities should be advanced in sport, what we see is that the larger structural forces which prioritize high-performance maintain their institutional momentum over and against the noble rhetoric of the CSP.

In 2002 the federal government released the first formal Canadian Sport Policy ("CSP 2002") which contained four new priorities: enhanced participation, enhanced excellence, enhanced capacity, and enhanced interaction with second two priorities meant as supports for the first two.[164] The policy attempts to balance the high-performance focus with the participation aspect of growing sport, but in the government's own evaluation of the policy, the reviewers "concluded that the Participation goal has not been achieved but that very good progress has been made in Excellence and Capacity and extremely good progress has been made on the indicators for Interaction."[165] The evaluation identifies financial and human resources at the provincial and territorial level as well as a lack of "profile" for the policy within the sport sector as a possible reason for the deficiencies.[166] Although the evaluation attempts to lay blame at the feet of the provinces and territories, it is also important to consider that of the $140 million allotted to sport in 2005-2006 only $5 million was directed to participation related initiatives.[167] That level of funding disparity does not, on its face, seem indicative of a desire on behalf of the federal government to support participation and high performance at the same

[164] Thibault & Harvey, *supra* note 31 at 26.
[165] The Sutcliffe Group Inc., *Interprovincial Sport and Recreation Council: Evaluation of the Canadian Sport Policy*, (Ottawa: SIRC, 2010) [accessible here: https://sirc.ca/wp-content/uploads/2019/12/csp_evaluation_final_reporten.pdf] at 5. Cf. Thibault & Harvey, *supra* note 31 at 30.
[166] *Ibid* at 6-8.
[167] Green, *supra* note 40 at 935.

level. Green and Houlihan report: "a leading Canadian sports analyst explained that there was 'clear tension in the room' at the National Summit on Sport in Ottawa in April 2001 as it became apparent that the government expected NSOs to realise federal goals on 'participation and co-ordinating the system and not to put all [their] money into high performance sport".[168]

The CSP 2002 was renewed in 2012 based on new goals, but the funding of sport continues to tell the same story of a rationalized high-performance bias on the part of the



federal government. Leading up to the renewal at a 2011 summit "concerns over the limited success achieved with sport participation led to the emergence of a number of themes" including "physical literacy, values and ethics, equity, access, inclusion and diversity".[169] In the end, the policy focused on 5 goals: physical literacy, introduction to

[168] Green & Houlihan, *supra* note 65 at 105 (Citations omitted).
[169] Thibault & Harvey, *supra* note 31 at 29-30.

sport, recreational sport, competitive sport, and high performance sport.[170] In the image above we can see that the government hoped to project the idea that high-performance sport had a smaller proportional importance relative to the other goals.[171] Although these themes shaped the renewal of the CSP, "when the allocation of federal funding for specific programs is considered along with the manner in which various high performance sport initiatives have been supported, it is clear … they are clearly entrenched as policy priorities."[172] Part 8 of CSP 2012 says this explicitly where the responsibilities of the federal government begin with "high performance athlete, coach and sport system development at the national level".[173]

As of writing, CSP 2023 remains under development, but it is worthwhile to note that the early position papers and materials produced which setup the design of the new policy are promising. In *Toward the Next Generation Canadian Sport Policy 2023-2033* the Policy Implementation and Monitoring Working Group insists on the social embeddedness of physical activity which includes sport rather than focusing on the dyad of high-performance sport and participatory sport.[174] Perhaps one of the largest changes from the CSP 2012 is that this new policy will specifically attend to abuse issues. Whereas the CSP 2012 did put a premium on respect and ethical treatment in sport, CSP 2023 will (if we can trust this position paper) engage with the reality of unequal power

[170] Canada, Canadian Heritage, *Canadian Sport Policy 2012* (Ottawa: SIRC, 2012) [accessible here: https://sirc.ca/wp-content/uploads/files/content/docs/Document/csp2012_en.pdf][CSP 2012] at 3.
[171] *Ibid* at 7.
[172] Lisa M. Kikulis, "Contemporary Policy Issues in high Performance Sport", in Lucie Thibault & Jean Harvey eds, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013) at 103.
[173] *CSP 2012*, *supra* note 170 at 17; Cf. Harvey, *supra* note 31 at 41.
[174] Canada, Sport Canada (Policy Implementation and Monitoring Work Group), *Toward the Next Generation Canadian Sport Policy 2023-2033,* (Ottawa: Government of Canada, 2021) at 4.

dynamics in sport and the burden of safety placed on volunteer organizations around the country.[175]

To conclude this discussion of CSP it is worth noting that although the spending patterns of the federal government reveal a trend in funding of high-performance programs, it is true that the government invested in more participation related activities just simply not at the same level.[176]As Donnelly tells us, "the lack of formal policy dealing specifically with participating provides an indication that the federal government was more concerned with excellence than with participation".[177] He goes on to show that Sport Canada's funding framework which is ostensibly meant to reflect the principles of CSP at the time "does not depend on increasing the number of participants in … sport".[178]

2.5.2 Own the Podium

Own the Podium or "OTP" is a key piece of evidence for the continued rationalization of sport in the post-*Dubin Inquiry* period. OTP is a particularly interesting program in the story of sport rationalization because it is a vehicle for delivering government monies to sport organizations without the government needing to take responsibility for the pattern OTP follows, i.e. one which favours high-performance.

We can see from a review of the funds transferred to the different Sport Canada programs that the government in this period continued to heavily invest in high-

[175] Canada, Sport Canada (Policy Implementation and Monitoring Work Group), *Toward the Next Generation Canadian Sport Policy 2023-2033,* (Ottawa: Government of Canada, 2021) at 8.
[176] Menard, *supra* note 113 at 5-6.
[177] Peter Donnelly, "Sport Participation" in Lucie Thibault & Jean Harvey eds, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013) [Donnelly, "Sport Participation"] at 177.
[178] *Ibid* at 192.

performance related initiatives.[179] Dowling and Smith concluded that between 2006 and 2016 there was "a 150% increase in federal government investment in Olympic and Paralympic summer sports programs from C$52,155,194 during the Beijing quadrennial to C$129,590,250 in the lead-up to the London 2012 Summer Olympic Games".[180] The authors credit CSP 2002 as one of the key reasons for this increase in funding.[181] On its face, this funding surge is indicative of at least a prioritization in ensuring the continuing existence of high-performance sport in Canada, but it also plays into the politicization of sport with which I began this chapter. Donnelly writes: "governments are apparently engaged in this 'race' in order to make symbolic statements about national identity, pride and virility".[182] We have to keep in mind that in the background of the rationalization of sport in Canada is that it originated out of a period when Canadian unity and the political utility of sport made international athletic achievement particularly poignant and politically expedient.[183] This funding pattern comes to a head with the creation of the OTP program.

Own the Podium began in 2004 when:

> a consortium of high-performance stakeholders met in Calgary to discuss how to achieve Canada's goal of reaching first place on the podium for the Vancouver 2010 Olympic Winter Games and the top three places at the Vancouver 2010 Paralympic Winter Games (Priestner Allinger & Allinger, 2004). The outcome of these discussions was the creation of a C$117 million technical program initiative entitled "Own the Podium

[179] Cf. Menard, *supra* note 113 at 4: The data for 2019-2020 until 2022-2023 from the Public Accounts of Canada records confirms the trend continues today: https://open.canada.ca/data/en/dataset/69bdc3eb-e919-4854-bc52-a435a3e19092/resource/1b3a58d1-f37b-48fe-90cb-c4d3ecab2bef?inner_span=True
[180] Mathew Dowling and Jimmy Smith, "The Institutional Work of Own the Podium in Developing High-Performance Sport in Canada" (2016) 30:4 Journal of Sport Management 396 at 396. Citations removed.
[181] *Ibid.*
[182] Peter Donnelly, "Own the Podium or Rent It? Canada's Involvement in the Global Sporting Arms Race" (2010) *Policy Options* 31:4 at 84-86 cited by Kikulis, *supra* note 172 at 98.
[183] Donnelly, "Sport Participation", *supra* note 177 at 190.

> 2010" with the initial intention at least of dissolving the initiative post-Olympic Games."[184]

Of course, OTP did not dissolve following the Vancouver Olympics, and a sister initiative, called "Road to Excellence—2012", took shape targeting the summer Olympics.[185] Neither of these were explicitly federal programs when they began, but both were endorsed by the federal government.[186] Eventually OTP became its own organization which is "funded by Sport Canada's Sport Support Program as one of many MSOs that lead or coordinate the delivery of specific services to the national sporting community… Despite [a] heavy funding reliance, OTP operates at a relative "arm's length" from the federal government".[187]

Part of the way that the OTP is so influential over sports beyond simply controlling large sums of money is that it integrated itself so quickly into the existing funding streams available to sports. Dowling and Smith point out that OTP used Sport Canada's Sport Funding Accountability Framework (SFAF) as a starting point for its own evaluations of sports. They note: "With the creation of OTP […] NSOs are now required to undergo an entirely separate OTP assessment review to receive so-called "Enhanced Excellence Funding" as part of the SFAF process."[188] This creates an obvious association and presumed alignment between the government and the government-funded OTP.[189] Even though OTP is not a government organization in a formal sense because it is so deeply embedded with Sport Canada it *feels* like it is which, to some extent, undermines

[184] Dowling & Smith, *supra* note 180 at 397 citing C Priestner Allinger & T Allinger (2004). *Own the Podium: 2010 final report* (Ottawa: OTP, 2004).
[185] Thibault & Harvey, *supra* note 31 at 26.
[186] *Ibid*.
[187] Dowling & Smith, *supra* note 180 at 399.
[188] Dowling & Smith, *supra* note 180 at 402.
[189] *Ibid* at 403.

the governments capacity to convince sports to prioritize initiatives and programming without OTP funding attached to them.

National sports are often forced to follow OTP's mandates which, in some cases, *conflict with* other government policy priorities or at least do not perfectly align.[190] Green and Houlihan point out that this tension existed directly prior to OTP's creation as between the policy priorities of CSP 2002 and those of the Canadian Olympic Committee (the "COC") at the time. They write: … at the same time as the new federal sport policy was formulated, which apparently downgraded the priority of elite sport, the COC adopted an almost diametrically opposed policy position, and 'approved a major shift in its funding practice'."[191] My point is that notwithstanding the shift in policy rhetoric in each of the CSPs, the spirit of rationalization toward high-performance objectives exerted power from government-adjacent organizations via funding mechanisms. Robin Beamish concludes that

> despite the [*Dubin Inquiry*] and [its] recommendations, Sport Canada, the Canadian Olympic Committee, the federal government, and, in the wake of the 2010 Games, the Canadian media and public at large have firmly embraced "Own the Podium 2010," which ties funding directly to success measured in medal counts. Moreover, "Own the Podium" has raised the bar on technological advancement and the systematic and focused use of sport science, pure science, and applied science to make athletes faster, push them higher, and build them even stronger. Even though Dubin was particularly critical of the performance-oriented thrust of Towards 2000, "Own the Podium" has taken performance objectives, medal targets, and the twinning of funding with medal-winning athletes to new heights within the history of Canada's high-performance-sport system.[192]

[190] Kikulis, *supra* note 172 at 103.
[191] Green & Houlihan, *supra* note 65 at 98.
[192] Beamish, "Dialectic", *supra* note 65 at 140-141.

2.5.3 The Physical Activity and Sport Act[193]

We see a similar tension between the rhetorical language in the new sport legislation, *The Physical Activity and Sport Act* ("*PASA*"), and the actual function of the law. The objectives of the *PASA* are separated in two categories: physical activity and sport. The physical activity objectives come first and are more numerous whereas the sport objectives refer mostly to participation and capacity building and only once to the "pursuit of excellence".[194] Nevertheless, Stephanie Eckert concludes that the new legislation clearly remains focused on high-performance.[195] She persuasively demonstrates that many of the changes from the previous legislation to *PASA* represent an *increased* focus in the new legislation on high-performance and in many other ways *PASA* and *FASA* are mostly the same. For example, Eckert notes that the phrase "Provide bursaries or fellowships to assist in the training of necessary personnel" in *FASA* was changed to "Provide bursaries or fellowships to assist individuals in pursuing excellence in sport" in *PASA.*[196] Also where *FASA* says: "Coordinate federal activities related to the encouragement, promotion, and development of fitness and amateur sport, in cooperation with any other departments or agencies of the Government of Canada carrying on such activities" *PASA* now reads "in cooperation with any other departments or agencies of the Government of Canada carrying on such activities" with "particularly those initiatives related to the implementation of the Government of Canada's policy regarding sport, the hosting of major sporting events and the implementation of anti-doping measures, in cooperation with other departments or agencies of the Government of Canada."[197] In both

[193] *Physical Activity and Sport Act*, SC 2003, c 2 [*PASA*].
[194] *Ibid* at s 3.
[195] Eckert, *supra* note 80 at 200.
[196] Eckert, *supra* note 80 at 160.
[197] *Ibid* at 160-1.

of these examples we see a clear adjustment to more high-performance or excellence related programs.

Perhaps the largest and widest-reaching change is the creation of the SDRCC.[198] Eckert helpfully distills her review of the legislative discussions related to the establishment of the SDRCC. She writes:

> Each of the issues that pervaded the discussions surrounding the establishment of the SDRC address the government's broad objective to reproduce the values of 'Fairness, Fair Play, and Ethical Decision-Making' through sport. However, this solution is reactive rather than proactive. The SDRC solution fails to address the fundamental problems that underpin Canada's performance-oriented system, such as those identified in the *Dubin Report* and [*Sport*]. For example, rather than reflecting on and resolving the question of whether "we appreciate the difference between 'being the best you can be' and 'being the best,'" the SDRC solution provides a mechanism by which to resolve disputes that arise when athletes are trying to 'be the best.' Therefore, at its very core, the SDRC solution indirectly reproduces the value of winning, rather than that of 'Fairness, Fair Play, and Ethical Decision-Making.' Moreover, because the SDRC was designed to serve athletes and other stakeholders at the highest levels of the Canadian sport system, those who fail to reach that level are far less likely to benefit from its services.[199]

For our purposes, it is important to see how even with the additional rhetoric and some new programming pointing to participation and ethics in sport, the federal government constrained those developments within a framework of high-performance and, thus, continued to rationalize the sport system around high-performance objectives.

2.5.4 Summary

The important takeaway from this reflection on the period following the *Dubin Inquiry* is that we can see clear indications that sport continues to rationalize and rally around high-performance objectives. There was new policy emphasis on participation as well as ethical and fair sport, but the record shows that Canadian sport remained

[198] Eckert, *supra* note 80 at 160-1.
[199] *Ibid* at 137-38 (Citations omitted).

dedicated to achieving excellence and winning medals. As I have noted throughout this chapter, this is the commitment to high-performance creates the cultural conditions in which harm is normalized and becomes part of the accepted conditions for success.

For the sake of completeness, I want to mention that organizations like True Sport and the CCES are engaged in value-building activities and working to promote a more ethical sport culture as a result of the developments following the *Dubin Inquiry*. As mentioned above, in 1995, the Canadian Centre for Drug-Free Sport merged with Fair Play Canada to become the Canadian Centre for Ethics in Sport (CCES).[200] Then, in 2001 federal and provincial governments signed the London Declaration in order to "to bring ethics and respectful conduct back into the way Canadians play and compete".[201] This was followed by the *Strategy for Ethical Conduct in Sport* (focused mostly on performance enhancing drug use).[202] But then in 2003 the "Sport We Want Symposium" resulted in a call for a national strategy related to improving the ethics in sport which the CCES took on in 2004 as the True Sport Strategy but has since become its own foundation called True Sport.[203] I will reflect on this more in the final chapter, but the culture building work these organizations are able to do is ultimately not disruptive to the overarching culture of sport. Because much of the power, influence, and leverage is organized in terms of breaching codes and contracts, the promotion of specific values as a

[200] Thibault & Harvey, *supra* note 31 at 19.
[201] True Sport, "History of True Sport", *TrueSportPur* (website) [accessible here: https://truesportpur.ca/history-true-sport].
[202] Canada, FPTSC Work Group, *Canadian Strategy for Ethical Conduct in Sport: Policy Framework,* (Ottawa: Government of Canada, 2002) at 2-5.
[203] CCES, *Annual Report: April 1, 2003 to March 31, 2004* (Ottawa: CCES, 2004) at "Message to Stakeholders" [accessible here: https://www.cces.ca/sites/default/files/content/docs/pdf/cces-03-04annualreport-e.pdf]; True Sport, "History of True Sport", *TrueSportPur* (website) [accessible here: https://truesportpur.ca/history-true-sport]; Carona Designs Inc. and InterQuest Consulting, *The Sport We Want Symposium: Final Report* (Ottawa: CCES, 2004).

separate activity ends up being an after-thought rather than the focus when it comes to the culture of sport. Furthermore, as we will see, the mechanisms we use to react to harm in sport do not refer effectively or at all to the values promoted by these organizations which further entrenches this disconnect.

2.6 Conclusion: Connecting high-performance to maltreatment

This chapter describes how the historical development of sport culture driven by rationalization contributes to conditions which allow maltreatment to occur today. Based on this historical review we can rightly contend that there is a persistent structural rationalization of sport policy around high-performance objectives. The result is that sport is built on values of winning, instrumentality, bodily sacrifice, and performance and creates a large amount of pressure on athletes and sport organizations. These values frame how participants treat one another and themselves because they underly the very nature of the sport system. In 1990, this rationalization is revealed to the country by the *Dubin Inquiry*, after which there is a concerted shift in rhetoric and some new policy development to ostensibly shift sport policy toward participation and more ethical competition. The reality, however, is that these developments simply become part of the rationalization and end up either playing lip-service to aspirational ideals or being *in service* of high-performance objectives already being prioritized. In short, even though there seems to be a shift toward more ethical and safer sport what we see is a continuation of the culture which began in the 1970s. Bruce Kidd says:

> The current regime of high-performance sport in Canada is particularly dehumanizing. It devalues the athletes' intrinsic worth through its overwhelming emphasis upon medals and winners; and it makes competitors vulnerable to the pressures of economic hardship. Both of these factors were examined by Justice Dubin. The present system also compels them to mould their bodies and minds solely to meet the demands of their particular sport. First and foremost is the body. Just as a hockey player cuts, planes, and sands his or her stick until it is just

> right, all high-performance athletes trim, contour, and compel their bodies to be the precise instruments that world-class athletic performance demands. This is not the clandestine activity of a few, but the central focus of the entire sports system, carefully directed and monitored by a phalanx of professionals – not only coaches, but also physiologists, biochemists, biomechanists, and ergonomists. This support staff makes use of 'legal' drugs and performance-enhancing practices (endless vitamins and electronic stimulators, for example) and the latest in technical equipment and research. Then the 'competitive mindset' is constructed with the help of the sports psychologist, often without regard to the implications for mature character development and long-term mental health. The development of the athletes' central reality – what sport has come to mean in day-to-day life – is a necessity for them to 'perfect' themselves and perform at the limits of human physical potential – and to attempt to surpass those limits. The expectations and funding polices of the state and the sports–media complex make it inescapable.[204]

In light of the evidence that the culture of sport continues to be rationalized in a way that produced he conditions for the events underlying the *Dubin Inquiry* to occur and for the maltreatment issues we face today.

The main point of connection between high-performance sport culture and maltreatment is the way in which the values (e.g. competitiveness, winning, performance, sacrifice, deep loyalty etc.) which are traditionally found in a high-performance sport culture inject themselves into the way the sport administrators work, the way the coaches coach, and the way the athletes treat one another and themselves.[205] Citing a study from 2001, the Canadian Academy of Sport and Exercise Medicine said, in 2011, that that sport culture is a risk factor for sexual abuse and sexual exploitation of athletes.[206] Frank Jacobs, Froukje Smits, and Annelies Knoppers support this argument in a study from 2016 which documents coaches and sport administrators using high-performance metrics

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[204] Kidd, "Excellence", *supra* note 12 at 466 (Citations omitted).
[205] Peter Donnelly, "Autonomy, Governance and Safe Sport", in Julie Stevens ed, *Safe Sport: Critical Issues-and-Practices* (St. Catharines, Ontario: Brock University, 2022) at 68.
[206] Eileen J. Bridges, Ashley E. Stirling, E. Laura Cruz, & Margo L. Mountjoy, "Canadian Academy of Sport and Exercise Medicine Position Paper Abuse, Harassment, and Bullying in Sport" (2011) 21:5 Clinical Journal of Sport Medicine at 387-8, citing JD Bringer, CH Brackenridge, LH Johnston, "The name of the game: a review of sexual exploitation of females in sport" (2001) *Current Women's Health Report* 1 225–231.

as justifications for abusive practices. Furthermore, this study reveals the connection between the values shaping interactions as between athletes and the values shaping interactions between coaches and athletes or administrators and athletes. That is to say that the way athletes are coached to achieve high-performance bleeds into the way they treat others when/if they become coaches or administrators. The culture of sport on the field of play thereby invades the culture of the sport system which delivers it.[207] This cyclical reinforcement of values and practices normalizes the practices and further entrenches the values which justify them. This kind of normalization has the capacity to reach outside the high-performance arena and take root in recreational sport as well. Stafford et al., for instance, found examples of abusive practices in recreational level sport which were meant to emulate the practices of high-performance sport. They identify a desire to match the culture of high-performance sport as a reason for adopting these practices.[208] Kerr, Battaglia, and Stirling provide a precise summation of these points:

> Sport cultures, particularly at the elite level, increasingly link funding to performance outcomes of the athlete or team. When a team […] wins international competitions, funding from Olympic committees and sponsorships increase. In such a performance-driven culture, values such as self-sacrifice, unyielding dedication and commitment to "the game," taking risks, challenging limits, and winning are considered exclusive guides for appropriate athlete behavior […] With a focus on winning as the ultimate objective, athletes are vulnerable to being treated as expendable subjects ("means"), and as a result, experiences of maltreatment become normalized in the pursuit of performance excellence ("ends") […] During the [Larry] Nassar trial, survivor statements revealed that [the US Olympic Committee's] and [USA Gymnastics'] win-at-all-costs mentalities fostered a culture in which the needs and interests of athletes were disregarded in favor of performance goals, and as a result, athletes were socialized to accept physical, emotional, and sexual abuse […]. Some have proposed that the tremendous performance success experienced by the athletes enabled

[207] Jacobs *et al*., *supra* note 11.
[208] Anne Stafford, Kate Alexander & Deborah Fry, "'There Was Something That Wasn't Right Because That Was the Only Place I Ever Got Treated Like That': Children and Young People's Experiences of Emotional Harm in Sport" (2013) 22:1 Childhood 121 at 134.

> USAG to avoid scrutiny and ignore maltreatment accusations such as those reported against Nassar….[209]

The next chapter of this thesis takes a closer look at how responses to maltreatment have evolved within this context. We begin that analysis aware that this bias and the culture it creates are contributing factors to the abuse itself, but next we will see how it influences the ways in which we react to abuse, as well.

[209] Kerr *et al*., "Systemic Issue", *supra* note 2 at 240. (Citations removed).

CHAPTER 3: THE DEVELOPMENT OF MALTREATMENT RESPONSE MECHANISMS IN CANADA

3.1 Introduction

The previous chapter traced the trajectory of rationalization in the structure of amateur sport in Canada from its nascency in the 1960s until the present. I discussed how it contributes to the cultural conditions for the use of performance enhancing drugs as well as maltreatment. This chapter will show that the current national mechanism for responding to maltreatment in Canada is based on liberal legalism which is itself part of the dynamics of rationalization. In other words, I draw a connection between the rationalization of sport around high-performance and the way sport administration has developed pathways for resolving disputes and responding to harm (i.e. harassment, abuse, maltreatment, etc).

3.1.1 Liberal Legalism and Rationalization

Liberal legalism reduces moral conduct to "rule following" and understands relationships between people as framed in terms of "rights and duties" defined by those rules.[210] It is animated or guided by the liberal philosophy. Richard Devlin provides a concise description of the major tenets of liberalism:

> Liberal political theory has as its starting point an ontology - a theory of being or personhood - that assumes a rational, free-choosing, autonomous self that is prior to, and independent of, both the community and other selves. That is to say, Liberalism takes as its premise an individualized self and upon this foundation constructs a political philosophy and legal theory that is designed to maximize the realm of action that is available to such a self. As a result, Liberal political philosophy argues that society should be governed by the principles of liberty, equality and neutrality. To be more specific, Liberalism advocates that the state and law should strive to provide the citizen with as much space as possible to pursue her own self interests (liberty); that each person should have the equal right to pursue such interests without formal restraints because of their identity, be it on the basis of their race, gender, class or ability (equality); and, that the state should remain

[210] For a definition of legalism see Judith N. Shklar, *Legalism: An Essay on Law, Morals and Politics* (Cambridge: Harvard University Press, 1964) at 1.

> agnostic as to the nature of a good life, thereby allowing each individual to determine their own conception of the good as they might choose it in the marketplace of ideas (neutrality).[211]

Liberal legalism, then, resonates with how we came to understand rationalization in the last chapter insofar as it is predictable (the rules are applied the same to everyone) and transactional (rights and duties are a trade-off between people and the key analogy of interaction is a marketplace). It is also an impersonal and formalistic way of determining correct behaviour and allows for standardization across groups. Liberalism does not make special allowances for the uniqueness of each person; it merely encourages that uniqueness to emerge. These characteristics resonate with the explosion of reliance on technical knowledge and expertise which formalized the administration and delivery of sport in the 1970s and 1980s.

The impulse underlying rationalization to organize and make sense of our world in terms of *rational logic* comes from the Enlightenment and liberalism.[212] Steve Wall explains:

> In short, if human beings can grasp the rational order in the world as the Enlightenment promised, then this order can be explained to them. The limits on their freedom need be neither arbitrary nor inexplicable.[213]

Liberal individualism's commitment to individual freedom, therefore, conceptually overlaps with the idea that human arrangements ought to be rationally ordered and explicable. Jeremy Waldron writes: "…liberals are committed to a conception of freedom and of respect for the capacities and the agency of individual men and women, and that these commitments generate a requirement that all aspects of the social should either be

[211] Richard F Devlin, "Mapping Legal Theory" (1994) 32:3 Alta L Rev 602 at 610.
[212] Steve Wall, "Introduction", in Steve Wall ed, *The Cambridge Companion to Liberalism* (Cambridge: Cambridge University Press, 2015) 1 at 4-5.
[213] *Ibid* at 4.

made acceptable or be capable of being made acceptable to every last individual"[214] We see these values reflected in the implicit narrative of sport policy in Canada, i.e. that formally applied rules for funding and resource allocation will allow those individuals who are committed and talented enough to rise to the top. It does not, in other words, take into account variables like the support of other people and systems to achieving that success.

Ultimately, rationalization drives *society* to increasingly individualistic, calculable, and predictable methods of social arrangement while the law and legal concepts are instrumentalized into formal legal constructions which support those social arrangements.[215] Roberta Garner tells us that according to Weber

> [r]ational/legal authority, lodged in impersonal rules based on a means/end calculation, has become the predominant type of authority, reflecting the tendency toward rational modes of action. Bureaucracy is the most common modern form of organization based on rational/legal authority.[216]

Below I show that, *in sport*, we see legal concepts adopted and instrumentalized in ways which support the sport system's rationalization by emphasizing the atomism of individuals and their rights, denaturing human conflict into questions of sterile legal disputes over procedure, and, ultimately, creating a system for reacting to interpersonal harm fixated on finding blame and then punishing individuals.

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[214] Jeremy Waldron, "Theoretical Foundations of Liberalism" (1987) 37:147 *The Philosophical Quarterly* 127 at 128.
[215] Boucock, *supra* note 16 at 4.
[216] Roberta Garner, "Max Weber", in *Social Theory: Continuity & Confrontation, A Reader*, Roberta Garner ed, (Peterborough, ON: Broadview Press Ltd., 1999) at 89.

3.2 Sport Organizations and their Members

To Weber, the introduction of private contracts and private law generally as one of the foundational moments of rationalization.[217] Private contracts shift the focus of the law away from a paternalistic monarchical system toward something more *rationally* determined and predictable whereby the law becomes a kind of tool for the ruling class to advance their profit-oriented ends.[218] Private contracts are a way of leveraging state power to render human behaviour more predictable which is, in the long run, better for business.[219] Contract law creates a set of private rights as between the parties, i.e. by entering into a contract each party garners certain privately agreed upon rights and obligations.[220] As one commentator notes: "behind the law of contract lies a much broader set of economic, social, and political values that define the role of markets in our lives".[221] Contracts take on a similar role in the administration and organization of sport.

Firstly, sport organizations understand themselves as parties to a contract with their membership. As Mazzucco and Findlay claim that "[i]t is generally accepted that contracts are the backbone of sport."[222] And John Barnes writes:

> Most sport organizations are private, voluntary associations, as opposed to public authorities or boards exercising statutory powers. An association is a self-governing body whose members are in an ongoing contractual relationship defined by the rules, agreements and customs of the fellowship.[223]

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[217] Sally Ewing, "Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law" (1987) 21:3 L & Socy' Rev 487 at 498-9.
[218]Boucock, *supra* note 16 at 60-62 & 109; Cf. Duncan Kennedy, "The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought" (2004) 55:5 Hastings LJ 1031 at 1047-8.
[219] Ewing, *supra* note 217 at 499.
[220] Stephanie Ben-Ishai, "An Introduction to the Study of the Law of Contracts" in Stephanie Ben-Ishai & David R. Percy, eds *Contracts: Cases and Commentaries* 10 ed (Toronto: University of Toronto Press, 2018) at 9-13. Cf. Boucock at 61; See also, Ewing at 505.
[221] Michael Trebilcock, *The Limits of Freedom of Contract* (Cambridge: Harvard University Press, 1993) at *v* cited in Ben-Ishai, *supra* note 211 at 4.
[222] Marcus Mazzucco and Hilary Findlay, "Jurisdiction", in Julie Stevens ed, *Safe Sport: Critical Issues-and-Practices* (St. Catharines, Ontario: Brock University, 2022) at 104.
[223] Barnes, *supra* note 141 at 68.

Corbett et al., convey a similar message in their handbook for sport organizations, i.e. "… a private organization's 'rules' (as set out in its governing documents) form a 'contract' between the organization and its members".[224]

Scholars often argue that the formation of the contract between members and sport organizations is grounded in the voluntary agreement of the members to the by-laws and rules of the sport organizations.[225] To my mind, the reality is more complicated insofar as participation in sport requires submission to the terms *offered* by sport organizations. Nevertheless, liberal legalism and its principle of freedom of contract requires that the parties be freely consenting.[226] The upshot is that the relationship between members and sport organizations is based contractual terms (a set of formal rules) which must be followed not out of a duty to sport or to one another person but out of obedience to the contract.[227] We cannot ignore the way in which this structure reproduces the basic construction of rule-oriented legalism noted above.

As discussed in the previous chapter, sport organizations began to also form contracts with individual athletes in the 1970s.[228] Kidd and Eberts argue that in light of the bureaucratization and professionalization in sport as well as "the pressure to produce winners" sport organizations expanded their mechanisms of control over athletes which often took the shape of contracts whereby the governing bodies could dictate athlete behaviours from training regimens to curfews at international events to even

[224] Rachel Corbett, Heather Potter, & Hilary A Findlay, *Administrative Appeals*: *A Handbook for Sport Organizations* (Edmonton: Centre for Sport Law, 1995) [Corbett *et al*., *Appeals*] at 8.
[225] Mazzucco & Findlay, *supra* note 222 at 104-6.
[226] Cf. Ben-Ishai, *supra* note 220 at 4-5: Ben-Ishai problematizes the idea of freedom of contract here, but recognizes its centrality to the predominant legal theory of today.
[227] Corbett *et al*, *Appeals*, *supra* note 224 at 8.
[228] See note 94.

relocation.[229] These formalized legal relationships are clearly meant to increase the efficiency, calculability, and predictability of the people involved, and, thereby, model a capitalistic transaction which is, conveniently, exactly what John Munro explicitly called for in 1971.[230]

I want to draw out here that the introduction of private ordering in and through a formal legal mechanism like a contract narrows the range of imaginable relationships people can have in sport. In fact, it limits that range to a transactional relationship whereby atomistic individuals relate to other atomistic individuals in pursuit of their individual and separate goals. Their relationships are transactional exchanges in furtherance of separate objectives, and the promises or assurances the parties exchange exist only in order to create private rights or obligations. Contracts thereby define the way people relate in sport to each other and the organizations artificially and as a means to an end.[231]

By relying on such contracts, the sport community shifts toward a more formal legal rationalism which supports a commitment to individual autonomy and freedom of choice.[232] This is an important point because it underlines the inherent individualism at the core of the legalism present in sport. If we look through Weber's lens then we can say that the move from 'kitchen table'[233] or personal relationships to more contractual formal

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[229] Bruce Kidd and Mary Eberts, *Athletes' Rights in Canada* (Toronto: Government of Ontario, 1982) at 99; and Beamish & Borowy, *supra* note 72 at 375-6.
[230] John Munro sought "to move the administration of sport off the kitchen table and into a more professional and efficient atmosphere". (*Sport Canada/Recreation Canada*. A report presented to the National Advisory Council on Fitness and Amateur Sport. May 7, 1971, at 2 (cited in Kikulis *et al*., *supra* note 65 at 358.)
[231] Boucock, *supra* note 16 at 61.
[232] *Ibid*; See also, Ewing, *supra* note 217 at 505.
[233] Here I am implying a comparison between what Weber would call customary or traditional law and 'kitchen-table style' sport governance. Boucock writes:

relationships is partly about a move toward more individually determined relationships as opposed to those determined by the accident of physical location, family, immediate community, and/or social position. Similarly, the freedom to contract is about individuals negotiating the terms of their relationship in the furtherance of each individual's own personal objectives. And, for Weber, it is partly from this fact that contracts have authority at all, i.e. we ought to fulfill our agreements simply because we *freely* agreed to do so.[234] Framing relationships in sport in terms of legal contracts emphasizes the separation of the individuals involved from one another and from the governing bodies. Each relationship accrues its own contract or contractual framing, and each party has its own negotiated objectives, rights, and obligations. It is an intensely legal way of thinking which narrows the expectations people can have about what resolution looks like if and when these contracts begin to breakdown as well as obscures the power dynamics at work by fallaciously positing equality of bargaining power.

The last point I want to make about the introduction of contracts into sport is that it comes tied to the commercialization and marketization of sport.[235] McLaren notes that the "melding of the business realm with sport forever changed the dynamics of this

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> Customary law is also nonpositive: 'originally there was a complete absence of the notion that rules of conduct possessing the character of *"law",* i.e., rules which are guaranteed by "legal coercion", could be intentionally created as "norms"'. Although the utility of legal norms for resolving disputes and binding behaviour to a 'valid' order may have been recognized, legal norms were still not conceived as the products of, or subject matter for, human enactment. Rather, their 'legitimacy' 'rested upon the absolute sacredness of certain usages as such ... As "tradition" they were, in theory at least, immutable'. In summary, in a society that holds people together through a collection of partially articulated, largely tacit, customary rules, general norms are not considered the subject matter of human creation, nor is their administration the responsibility of a government body distinguished from the society at large. Law exists as a collection of nonpositive, nonpublic rules (*supra* note 16 at 46-47, citations omitted).

[234] Boucock, *supra* note 16 at 61.

[235] Richard McLaren, "A New Order: Athletes Rights and the Court of Arbitration at the Olympic Games" (1998) VII Olympika: The International Journal of Olympic Studies at 2.

area".[236] As the government adds more funding opportunities to sport and we see increased attention from television and media, the financial opportunities for athletes increase.[237] The IOC allowing some professional athletes access to the Olympics in 1986 also intensified this reality because it meant that the Olympic athletes could be paid more by their home countries.[238] In order to protect their investments in athletes, sport organizations and governments reached for the legal mechanism available for such a transactional exchange, i.e. a contract. At the same time, these contracts would have also appealed to athletes insofar as they created an actionable obligation to provide payment on behalf of their funders. The *contractualization* of sport, therefore, supports the rationalization of sport by providing a market-oriented framework for organizing people in transactional ways that, ultimately, serve the goal of high-performance outcomes.

3.3 Disputes between Sport Organizations and Members

Part of the benefit of contracts and contractual logic to sport organizations is that they provide a leverage point over members and athletes. If a member does something which breaches the terms of the agreement, then the sport organization has the *right* and *authority* to terminate the agreement or take some other action that the agreement contemplates. The authority to make these decisions is grounded in the freely given consent to be legally bound (in the case of funded athletes) or it is grounded in the agreement of a member to the bylaws of the organization. In either case, when sport organizations assert their right to make a decision regarding discipline and eligibility of members and athletes, there is, at the same time, the potential for a dispute over that

[236] McLaren, *supra* note 235 at 2..
[237] *Ibid*. See also, Macintosh *et al*, *supra* note 12 at 4; Kidd, "Philosophy of Excellence", *supra* note 12 at 375-6. *Gilmour v. Laird,* [1989] B.C.J. No. 15 (S.C.). which held that going to the Olympics was worth $20,0000 (cited in Jodouin, *infra* note 257 at 297).
[238] McLaren, *supra* note 235 at 2.

decision.[239] These disputes, however, are not framed in terms of substantive contractual interpretation but in terms of process – how the decision was made.

The fact that sport is arranged through individual contracts between each member and the sport organization increases the probability that people will start to demand more procedural fairness in the way they are *individually* dealt with. Kidd and Eberts warn us that within these systems of command and control propped up by new expertise, expanding bodies of technical knowledge, and governmental resources the "rights of athletes are easily ignored".[240] They specifically advocate for new structures designed to create greater transparency and diminish arbitrariness in the decision-making of Canadian sport organizations by instilling a greater emphasis of the rule of law and "natural justice" (what we now call "procedural fairness") in sport organizations.[241] More broadly, Boucock explains that: "when disengaged individuals feel caught up in a threatening tangle of incomprehensible dependencies, an immediate response is to seek to reinforce autonomy through an augmentation of legally protected rights and immunities".[242] The separation of individuals into discrete contracts with the sport organization results in a disengagement from one another and the sport organization itself. This separation is in tension with the fact that sport and sport organizations require interdependency between individuals to function. In sport, we can see how decisions made by a sport organization that negatively affect an individual but are made, ostensibly, for the greater good of the sport might trigger the sense that the collective is threatening the autonomy of the

[239] Kidd & Eberts, *supra* note 229 at 13. McLaren basically agrees with these categories (*supra* note 235 at 2). And John Barnes cites Kidd and Eberts approvingly (supra *note* 141 at 75 and 77.) Paul Denis Godin comes up with similar categories as well ("Sport Mediation: Mediating High-Performance Sports Disputes" (2017) 33:1 Negotiation Journal at 27).
[240] Kidd & Eberts, *supra* note 229 at 100.
[241] Kidd & Eberts, *supra* note 229 at 19ff.
[242] Boucock, *supra* note 16 at 128.

individual. In response, that individual reaches for their right to natural justice or procedural fairness as a way of re-asserting their autonomy in the face of the collective's will.[243]

The legal justification and authority for procedural fairness owed to members of sport organizations comes from a 1952 court decision which established the common law regarding a sport organization's procedural obligations to its members.[244] In *Lee*[245], Lord Denning holds that the substance of the decision to expel someone from an association is not at issue because that is a matter of opinion based on the rules of the association, but the process of the decision making must be legally fair.[246] Note here how Denning's reasoning accords with the spirit of purposive rationalistic contracts. Insofar as private associations form via voluntary agreement, they ought to be left alone to protect the individual autonomy and freedom of contract on which they are grounded. The courts should not interfere with that freedom of individuals to make agreements or insert themselves in the substance of those agreements. Courts will, however, intervene on issues relating to contractual compliance and where the contract or its enforcement is unfair.[247] In both *Lee* and *Lakeside Colony*, which is Canadian and contemporaneous to the era of sport under discussion, the court explicitly indicates that it prioritizes protecting property rights created by contract and not necessarily access rights to a social group.[248]

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[243] Boucock, *supra* note 16 at 129.
[244] Barnes, *supra* note 141 at 68: nt. 161 (citing *Lakeside Colony of Hutterian Brethren v. Hofer, [1992] 3 SCR 165, 97 DLR (4th) 17* [*Lakeside Colony*] which relies *Lee* v. *Showmen's Guild of Great Britain* [1952] 1 All ER 1175); At notes 168 and 169 Barnes cites *Lee* v. *Showmen's Guild of Great Britain* [1952] 1 All ER 1175. See also: Corbett *et al*, *Appeals*, *supra* note 224 at 8 nt 2; and Mazzucco & Findlay, *supra* note 222 at 104 nt. 7.
[245] *Lee* v. *Showmen's Guild of Great Britain* [1952] 1 All ER 1175 [*Lee*].
[246] Stephen C. Miller, "The Legality of Social Clubs' Disciplinary Procedures" (2002) 1:3 Ent L at 107.
[247] Barnes, *supra* note 141 at 68
[248] *Lee, supra* note 245 at p. 1180 cited in *Lakeside Colony*, *supra* note 244 at p. 174.

This is, of course, further evidence of the market-rational trend in the legal world which is beginning to shape the sport world in the 1990s. Administering justice in favour of a functioning market made up of atomistic self-interested individuals becomes part of the way the sport world functions, so that decisions made about athletes are not challenged on their substance but on their procedure.

By focusing on procedure and not on the merits of a dispute, this legal framing in sport creates significant dissonance between the legally-framed appeal and the underlying desire triggering the dispute. Discipline and eligibility decisions have the potential to provide or restrict opportunities for athletes because punishments and shifting eligibility criteria might result in diminished access to competitive events and general participation.[249] It follows then that when someone appeals a decision it is not simply because the procedure was unfairly decided; it is because they would have preferred a different outcome. In other words, the underlying issue for the appellant is not the lacking fairness (although that might be part of it) but a dissatisfaction with the outcome. This dissonance represents Boucock's "threatening tangle". Individuals organized to pursue self-interested objectives who are met with the obstacles (e.g. a decision making them unable to compete) will attempt to re-assert their autonomy and self-interested objectives in ways which circumvent those obstacles. The disputes are reframed from *why the decision was made* to *how the decision was made*. In lieu of applying to a court regarding contractual entitlements, athletes begin to argue for fairer decision-making principles more generally.[250]

[249] Barnes, *supra* note 141 at 77 & 80.
[250] Kidd and Eberts, *supra* note 229.

Eventually, sports begin to embed these ideas of procedural fairness and natural justice into their own policies by creating internal appeals policies. These policies allow the sport organization to take control of appeals and perform their own analysis of the fairness of a decision rather than the courts. The very fact that these disagreements are called "appeals" signals the presence of legal logic and legal thinking, but, to put a fine point on it, one of the early pieces of guidance around this topic tells sport organizations that they are "non-statutory tribunals" and, thus, governed by administrative law.[251] Corbett *et al* encourage sport organizations to conform to the principles and structure of administrative law in order to avoid the courts.[252] By creating an appeal policy the sport organization shifts toward a more standardized and formal process for dealing with disagreements between itself and members and allows that process to be governed according to legal concepts, principles, and procedures. Those internal appeal policies describe not only the mechanisms and people involved in resolving the dispute but also the allowable formulation of disputable issues.[253]

There are two important pieces to take stock of at this stage. Firstly, the tendency of the courts (at least in the 1990s[254]) to protect the market-rational justification for freedom of contract and their insistence on fair formal procedures made it so that sport participants began to demand and advocate for procedural rights when decisions were made about them. This meant that the disagreements between a participant and their sport organizations were reframed in terms of legal procedural questions not the outcome of the decision, its broader implications, or the needs of the participants. It decontextualizes

[251] Corbett *et al*, *Appeals*, *supra* note 224 at 7 nt. 1.
[252] *Ibid* at 5.
[253] *Ibid* at 7 and 13; See also Barnes, *supra* note 141 at 78.
[254] *Lakeside Colony*, *supra* note 244.

the disagreement into a question of standards that the sport organization did or did not meet. It is not about the sport or the meaning of the decision to the sport. Secondly, this transition also further atomizes individuals by insisting that the disagreements a person can have with a sport organization is not relevant to the greater sport community but about that person's own procedural rights. In light of this standard of procedural fairness, sport organizations began to understand themselves and construct policies to reflect an internal legal logic grounded in administrative law principles and the concepts of procedural fairness.[255]

Thus, procedural rights or natural justice take hold of sport in a way that confirms its increasing rationalization and integration rational legalism. Fundamentally, structures which limit analyses to formal considerations rather than more substantive analyses also limit the expected outcomes and deliverables of that analysis. In other words, by shifting away from substantive analysis of disputes toward something more formal we can see the legalism in sport bending along the rationalizing arch toward more individualistic, predictable, and calculable ends.[256] Furthermore, the system is built on the premise of atomistic self-interested individuals connected by contracts. Because the courts are constructed, at least in part, to protect this premise and the individualistic freedom and autonomy it represents, disagreements within the system must be framed in terms the system can understand. Insisting on procedural fairness and natural justice does not vitiate the individual autonomy of contracting parties. In fact, it insists on a blanket of

[255] Corbett *et al*, *Appeals*, *supra* note 224 at 5.
[256] Cf. Carrie Menkel-Meadow, "Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "the Law of ADR"" (1991) 19:1 Florida State Law Review 1 at 7. To me, channeling disputes into specific legal framings also echoes the concerns that Macintosh, Whitson, and Green raise, i.e. that as technical expertise increases in sport issues which were once political and necessitated a kind of democratic consultation of other populations can now be answered objectively by an expert.

formal fairness for all individuals which protects their autonomy and reinforces their legal separation from one another.

3.3.1 Sport ADR in Canada

In the 1990s it becomes clear to the sport community in Canada that it is problematic to involve the courts in procedural disputes in sport.[257] Richard McLaren provides six common arguments for why the sport community should remove its disputes from judicial oversight:

- The facts of sports disputes arise from complex facts and are often unrelated to the interpretation of law;
- The costs of litigation are too high;
- Sport disputes require speedy turnaround times which can be unpredictable;
- International sport is a system built of a series of imbricated contracts which render the jurisdiction of courts complicated to unpack;
- There is a desire to keep the disputes private as between the parties to avoid public pressure; and
- There is a general resistance to involving courts where disputes were historically handled internally.[258]

These arguments all reflect the values which typify the rationalizing dynamics of sport, (i.e. predictable, calculable, transactional, and formal). Thus, the impulse toward more rationalized structures bleeds into how sport understands the necessary pieces for resolving disputes between sport organizations and their members.

This shift away from the courts was certainly accelerated by a complementary movement encouraging recourse to non-judicial external decision makers for dispute

[257] Barnes, *supra* note 141 at 104-106; Susan Haslip, "A Consideration of the Need for a National Dispute Resolution System for National Sport Organizations in Canada" (2001) 11:2 Marq Sports L Rev; Anik L. Jodouin, "The Sport Dispute Resolution Centre of Canada: An Innovative Development in Canadian Amateur Sport" (2005) 15:2 J Leg Aspects of Sport 293; Michael Lenard, "The Future of Sports Dispute Resolution" (2009) 10:1 Pepp Disp Res LJ; Mordehai Mironi, "The Promise of Mediation in Sport-Related Disputes" (2016) 16:3-4 Intl Sports LJ 131.
[258] McLaren, *supra* note 235 at 2-3.

resolution when internal mechanisms failed or were not enough. Writing in 1996, Barnes says:

> In Canada, studies of government policies and athletes' rights have urged sport organizations to establish fair procedures and have consistently recognized the advantages of arbitration as an alternative means of resolving disputes that have exhausted internal hearings.[259]

Alternative dispute resolution or ADR offered the sport community a new way of accessing resolution that remained built on agreement of the parties[260] but also had the capacity to more accurately adapt to the contours and exigencies of sport. ADR is an important part of the story of maltreatment mechanisms because after the 1990s and early 2000s, it becomes *the* main pathway to resolution in sport disputes in Canada. For the purposes of this chapter, I use ADR to refer generally to private non-court models for resolving disputes including: mediation, arbitration, or some combination of the two. At this stage in my argument, what is important is the proliferation of ADR professionals in sport and the way that sport begins to rely on "arbitration machineries" which act as a conduit for legal logic, terminology, and conceptual frameworks into sport.[261]

ADR in sport in Canada begins its story in 1991 when Rachel Corbett and Hilary Findlay founded the Centre for Sport and Law Inc. ("Sport Law").[262] Sport Law was (and still is) a for-profit private consulting company which provided advice and education materials to sport organization and the wider sport community. The point was to be a sort of clearing house for information for sports and to provide access to legal information

[259] Barnes, *supra* note 141 at 104.
[260] *Ibid* at 105: ADR is available to parties who agree to use it in case of a dispute.
[261] Mironi, *supra* note 257 at 134; In "Legacy" (*supra* note 8) Llewellyn connects ADR to the logic and premises of the civil legal system.
[262] Jodouin, *supra* note 257 at 300; Sport Law exists today as a national firm which assists sports with a wide variety of legal, managerial, and communications, issues.

since, as sport rationalized, it was also becoming more legalistic too. Sport organizations needed access to information in formats that were easy to understand and apply.[263]

In 1996, Sport Law began administering and organizing Canada's anti-doping program and handled all of the appeals and "reinstatement applications".[264] At the same time, it "operated the *ADR Program for Amateur Sport*, a voluntary arbitration mechanism for the sport community, which served as a precursor to the present day [SDRCC]".[265] Also in 1996, Sport Canada required NSOs to identify the appeal procedure for any funded athlete which meant that every funded sport was supposed to have a clear process and system for dispute resolution.[266] Although this was not a requirement to rely on ADR professionals outside of sport organizations, it certainly would have encouraged such a reliance. This also resonates with the overall movement in sport organizations away from a volunteer workforce to a more professionalized one. In other words, sport organizations were even more primed to accept such a service delivery model from professionals.

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[263] Rachel Corbett, "Harassment Issues in Sport – from 1994 to 2012" (2012) *Sportlaw* (blog), online:https://sportlaw.ca/harassment-issues-in-sport-from-1994-to-2012/. Rachel Corbett, "Centre for Sport and Law Assists Amateur Athletes across Canada" (2005) *Sportlaw* (blog), online: https://perma.cc/TN7U-LZVW [Corbett, "Centre for Sport and Law"].

[264] Corbett, "Centre for Sport and Law", *supra* note 263.

[265] *Ibid*; The *ADR Program for Amateur Sport* was partly the product of the Canadian Sport Council approving ADR as the method for dispute resolution for sport in 1994. Although there is some murkiness in the record and as between different sources, it seems to be the case that the *ADR Program for Amateur Sport* which Corbett claims lasted from 1996 to 2003 is the same thing as the "Sport ADR Project" which received funding in 1996 from Sport Canada but lost funding in 1997 (See Jodouin, *supra* note 257 at 300; Haslip, *supra* note 257 at 263; and *Win-Win*, *infra* note 267 at 5). I suspect that both are correct and that the *ADR Program for Amateur Sport* simply continued functioning privately operated out of Sport Law -- notwithstanding the loss of government funding.

[266] Haslip, *supra* note 257 at 248: Haslip does not identify the start date of the Sport Funding Accountability Framework, but it is clear from comparing when she is writing to other sources that she is referring to SFAF I which lasted from 1996 until 2000. See Eva P. Havaris & Karen E. Danylchuk, "An Assessment of Sport Canada's Sport Funding and Accountability Framework, 1995–2004" (2007) 7:1 European Sport Management Quarterly at 32.

In May of 2000 the ADR Work Group for Secretary of State for Amateur Sport released its report entitled *A Win-Win Solution: Creating a National Alternate Dispute Resolution System for Amateur Sport in Canada*[267] which recommended the creation of a national sport ADR program for all sports. With the creation of a centralized, government-funded, national ADR center, there would be little need or desire to move outside of the sport eco-system to seek resolution for disputes. And, eventually, in 2003, the federal government confirmed this reality by mandating all NSOs provide a right to appeal to the SDRCC.[268]

We cannot lose sight of the fact that the integration and acceptance of ADR mechanisms and professionals into sport is evidence of rationalization and the increasing liberal legalism in sport. For all the reasons that McLaren outlined above, the courts represented an *irrational* or, at least, unpredictable and expensive option for resolving disputes.[269] Internal appeal policies create work for the sport organizations and require a high level of technical and/or legal knowledge to be done well. ADR professionals and ADR, in general, offer a way of shuffling some of that work off the desk of the sport administrators and ensuring that the process is formally fair.[270] It is also true that relying on ADR and ADR professionals continues the professionalization of sport administration and plays into the marketization of sport and sport administration by creating a new space within which people can make money off of sport. The subtle siloing-off dispute resolution into a parallel industry similarly resonates with the ideas of bureaucratization.

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[267] Canada, Working Group to The Secretary of State (Amateur Sport), *A Win-Win Solution: Creating a National Alternative Dispute Resolution System for Amateur Sport in Canada* (Montreal: SDRCC, 2000) [accessible here: https://www.crdsc-sdrcc.ca/eng/documents/Working-Group-Report-e.pdf] [*Win-Win*].
[268] Godin, *supra* note 239 at 29.
[269] See note 258.
[270] Barnes, *supra* note 141 at 104.

Although it is not a formal office within the sport eco-system, there is a sense, even in the late 1990s and early 2000s, that dispute resolution should happen separately from the sport organizations but still within the sport system.

To summarize: between 1991 and 2003, NSOs in Canada went from having to deal with dispute resolution internally to being required to allow disputants an appeal to national dispute mechanism operating according to its own code of procedure. Coalescing dispute resolution in sport around a centralized body is intensely rational and formal, and it reveals this strong tendency in sport toward the logic of the legal system. The sport community appealed to the courts, then shifted away from them to internal mechanisms, and then back to a model almost as formal as a court but far more specialized to sport. By 2003 the sport community in Canada had replicated inside itself sport versions of many legal apparatuses and mechanisms available outside of the sport eco-system – as if this was some kind of progress and not a duplication of the failings of these other systems.

3.4 Disputes between Members

3.4.1 Early Harassment[271] Policies

The SDRCC and much of the Sport ADR infrastructure in Canada is organized around disputes arising between members and sport organizations mainly because the sport organizations have so much authority over the members which, in turn, necessitates procedural safeguards for decision making. This authority is, of course, rooted in the contract between the members and the sport organization. There is no such contract between members within a sport organization which means it is not immediately obvious

[271] Initially, scholars and lawyers writing about abuse in sport refer to it as harassment or abuse. It was not until later that they adopted the language of maltreatment. For a short discussion on the decision to use maltreatment rather than misconduct see: Sport Information Resource Centre, *Re: The Universal Code of Conduct to Prevent and Address Maltreatment in Sport, 5.1*, Ottawa: Sport Information Research Centre, 2019 [accessible here: https://sirc.ca/wp-content/uploads/2020/01/UCCMS-v5.1-FINAL-Eng.pdf] at 4.

what happens when there is a conflict between members, i.e. when a member claims that another member has caused them harm. In an organization organized legalistically according to formal contractual rules, privity of contract would tell us that members have no sport-related contractual obligations *to one another*.[272] This then begs the question: why are there response mechanism for maltreatment at all?

In personal conversations I have had with sport administrators this tension looms large. Given the mounting funding requirements for different complaint and appeal policies from Sport Canada, the legal costs for sport organizations are sky-rocketing – not to mention insurance costs – while funding for these concerns is not increasing considerably or at pace. The question of balancing the very continued existence of sport organizations against the costs of the expanding legal requirements remains at issue.

One possible reason that sport organizations were galvanized into assisting members in resolving conflicts is just that such conflicts were starting to make sport look bad.[273] Between 1993 and 1998 there was a series of public revelations of abuse. And, in fact, we can trace the beginning of research and popular awareness of widespread abuse in sport back to a specific group of 1993 television programs.[274] In these programs,

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[272] Robert Flannigan writes: "The doctrine of privity of contract applies in Canada to prevent two types of person from enforcing a contract. First, a person who is a complete stranger to the contract has no legal right to enforce the promise of any part to that contract. This aspect of the privity doctrine is uncontroversial. The second type of person affected is the third party beneficiary, the person identified and intended by the promisor and promise to receive all or part of the benefit of the agreed upon performance" ("Privity of Contract", in Stephanie Ben-Ishai & David R. Percy, eds *Contracts: Cases and Commentaries* 10 ed (Toronto: University of Toronto Press, 2018) at 285.

[273] Corbett, *Harassment in Sport*, *supra* note 7 at 7: "…harassment [was] revealed as a blight on sport as well as on society as a whole".

[274] Sandra Kirby, "Not in My Backyard Sexual Harassment and Abuse in Sport" (1995) 15:4 Canadian Woman Studies at 59; Corbett, *Harassment in Sport*, *supra* note 7 at 7; Celia Brackenridge, "'He Owned Me Basically…' Women's Experience of Sexual Abuse in Sport" (1997) 32:2 International Review for the Sociology of Sport at 119; Lorraine Lafrenière *et al*, "Harassment in Sport Blog Series - Blog One: Looking Back" (2015) *Sportlaw* (blog), online: www.perma.cc/QB5X-8R2X); Robinson, *supra* note 277 at 216.

according to Kirby, athletes discussed publicly, for the first time, the abuse they were suffering often at the hand of their coaches.[275] Kerr *et al*, also point out a number of serious sexual abuse revelations from the mid and late 1990s:

> …several international, high-profile cases emerged detailing experiences of sexual abuse of athletes at the hands of their coaches—persons in positions of authority who are entrusted with responsibility for athlete safety. In 1995, a British Olympic Swimming coach was charged with 15 counts of sexual assault and the rape of two teenaged swimmers. Two-time Olympic rower Heather Clarke alleged that her long-time coach had sexually abused her, her sister, and two other rowers for many years. Additionally, at that time, Sheldon Kennedy, a player in the National Hockey League, revealed that he had been groomed and sexually victimized by his coach, Graham James, beginning when Kennedy was just 13 years of age. In subsequent years, other hockey players coached by James also disclosed sexual victimization. The 1997 arrest of former Maple Leaf Gardens (Toronto) equipment manager, Gordon Stuckless, preceded the announcement that a 'pedophile ring' had been operating at the Gardens between the mid-1970s and the early 1980s.[276]

Also, Laura Robinson's book, *Crossing the Line*: *Violence and Sexual Assault in Canada's National Sport*, came out in 1998. Robinson's book contains explicit and extensive accounts of sexualized violence against and between young male hockey players by each other and coaches as well as the culture of violence they bring into their romantic and sexual relationships.[277]

All of these revelations came at a time when sport organizations were more and more likely to exert their authority to discipline athletes through increasingly formalized discipline processes; there was a requirement to have an appeal policy for disciplinary decisions; and appealing those discipline policies was increasingly likely to lead to some sort of formal process because more and more trust was being placed in ADR professionals. We can layer these formal requirements on top of an expanding nexus of

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[275] Kirby, *supra* note 274 at 59.
[276] Gretchen Kerr, Bruce Kidd & Peter Donnelly, "One Step Forward, Two Steps Back: The Struggle for Child Protection in Canadian Sport" (2020) 9:5 Social Sciences 68 at 5.
[277] Laura Robinson, *Crossing the Line: Violence and Sexual Assault in Canada's National Sport* (Toronto: McLelland & Stewart Inc., 1998).

fears around reputational damage and tort liability[278] for the abuse as well as liability for failing to provide adequate procedural fairness. All of these pressures and dynamics taken together further clarify why the sport community so quickly adopted a model which appeared to relieve some of this pressure and workload.

Rachel Corbett provides another possible reason for why sport organizations ought to adopt, what she then called, harassment[279] policies beyond the general risk to the reputation of sport, namely: avoiding or managing the risk and expense of litigation.[280] Corbett, here, is mostly referring to human rights complaints.[281] She cites the, then, recent decision *Janzen*[282]*,* which held that harassment includes "the hostile or poisoned environment which can be created by behaviour which is not directed towards any one individual or group of individuals, but which nevertheless creates an atmosphere which is intimidated, hostile, or offensive".[283] This case shifted the way the legal system understood sexual harassment. Post-*Janzen* sexual harassment did not have to be explicit; did not have to occur within a relationship of subordination; and there did not need to be a transactional *quid pro quo* exchange at stake (e.g. loss of opportunity because the harassment is resisted).[284] Corbett advises sports organizations that they are subject to human rights legislation and are, therefore, "prohibited from discriminating in the provisions of services or employment and from *ignoring, allowing, or condoning*

[278] See: Centre of Sport Law, "Case Comment: *Bazley V. Curry (the Children's Foundation)* 1999, 2 SCR 534" (Centre for Sport Law, 2003) [accessible here: https://sportlaw.ca/case-comment-bazley-v-curry-the-childrens-foundation-1999-2-scr-534/]
[279] Although Corbett's guidance refers to what we now refer to as maltreatment or just abuse, she used harassment in 1994 most likely because of its association with human rights law. For her, there was some rhetorical value in associating the targeted behaviours more with human rights law than with the criminal law.
[280] Corbett, *Harassment in Sport*, *supra* note 7 at 19.
[281] Corbett, *Harassment in Sport*, *supra* note 7 at 10-11, and 15.
[282] *Janzen v. Platy Enterprises Ltd.*, [1989] 1 SCR 1252, 59 DLR (4th) 352 [*Janzen*]
[283] Corbett, *Harassment in Sport*, *supra* note 7 at 10.
[284] *Janzen*, *supra* note 282 at p. 1282.

harassment…".[285] She goes on to suggest that "[a] harassment policy is the best way to" defend against human rights complaint.[286]

We should note here that although the outcome of Corbett's advice is a harassment policy which would govern how a sport organization responds to the complaint of one member about the behaviour of another, what she is actually guarding against is sport organizations allowing or being perceived to allow harassment to occur at a systemic level. She notes that this policy will merely be another disciplinary mechanism and, therefore, "not the essential ingredient" for eradicating harassment. She advises that "… the adoption of a harassment policy must be founded on a commitment to put in place the supporting educational components" to create real change in the "attitudes" of sport participants.[287]

Although Corbett is not wrong about the necessity of education, I want to point out that this is the beginning, in sport, of the arbitrary bifurcation between complaint mechanisms for policing behaviour and educational initiatives to change culture.[288] The implication here is that disciplinary policies are necessarily separate from education. This is representative of liberal legalism. Corbett recommends a policy which is mostly recognizable to us today based, in large part, on workplace sexual harassment frameworks and the sexual harassment policies from the University of Alberta.[289] The sample policy *formally* defines harassment and establishes the threshold conduct rules for

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[285] Corbett, *Harassment in Sport*, *supra* note 7 at 15.
[286] *Ibid* at 19. It is worth noting as well that framing harassment in terms of human rights also further removes these claims and the harm from the civil court system insofar as human rights claims occur within a separate system.
[287] Corbett, *Harassment in Sport*, *supra* note 7 at 7.
[288] I discuss this bifurcation more in Chapter 5, particularly as it relates to human rights commissions.
[289] Corbett, *Harassment in Sport*, *supra* note 7 at 31; See: Corbett, "Harassment Issues in Sport", *supra* note 263: Corbett explains that they adapted the materials from researchers and practitioners who were leading this area at the time, namely Shirley Voyna-Wilson and Sandra Kirby.

individual members to follow, but it does not create a way of taking note of or attending to the "hostile or poisoned environment" created by harassment.[290] Instead, it focuses on what happens when one individual complains about another individual. Because of the procedural requirements discussed above, the policy Corbett describes quickly becomes about protecting the procedural rights of the respondent and not about changing the "attitudes" of those engaged in the process.[291] The goal is clearly about (a) demonstrating the sport organization takes harassment seriously, and (b) appeal proofing any sanction that is imposed.

One of the major implications of such a procedure is that it removes the relevance of the person who was harassed by centering the analysis on the breach of a code not the harm to the other person.[292] This intensifies the formalism of the procedure insofar as it reaches for a standardized analysis. Thus, it increases the resonance between sport's legalism and "formal rationality [which] is mainly characterized by the subsumption of individual decisions under general rules…".[293] Again, we see the way in which rationalization dehumanizes the decision making in sport and replaces it with technical definitions and formulas. At the same time rationalization reduces the space in such policies for attending to educational or proactive initiatives because the point is not to understand the people or their needs but to assess the conduct of the individual who has interrupted the normal flow of transactional relationships and impose a penalty on them. It is not a market-rational strategy to reflect on why someone did something or the values

[290] Corbett, *Harassment in Sport*, *supra* note 7 at 10.
[291] *Ibid* at 7.
[292] Cf. Jennifer J Llewellyn and Robert Howse, *Restorative Justice: A Conceptual Framework*, (Toronto: Law Commission of Canada, 1999) at 9-10.
[293] Jon Elster, "Rationality, Economy, and Society", in Stephen Turner, ed, *The Cambridge Companion to Weber* (Cambridge: Cambridge University Press, 2012) at 22.

they might be channeling. Instead, the goal is to generate efficiency by, essentially, removing the inefficient component of the high-performance sport machine.

3.4.2 More Revelations Yield New Policies and Mechanisms

The fundamental difference between early harassment and abuse policies and more recent examples relates to who is administering the policies. In the early policies as described above, the sport organization is doing the work, so to speak. The federal government had even made it a condition of funding that sport organizations have harassment officers in 1996.[294] The investigation of the complaint and the adjudication are all organized by the sport organization and completed by it; often the president was charged with this duty. However, Donnelly et al found that, as of 2016, only 86% of NSOs had *accessible* policies and only 10% of those had harassment officers.[295] This, coupled with another highly public abuse revelation[296], and an announcement by the Minister of Sport, Kirsty Duncan in 2018[297], that Sport Canada would be stricter in

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[294] Donnelly *et al*., *supra* note 5 at 35.
[295] *Ibid* at 43.
[296] See CTV Montreal, "Sexual assault victims of ski coach demand changes to sports", *CTV,* June 4, 2018: [accessible here: https://montreal.ctvnews.ca/sexual-assault-victims-of-ski-coach-demand-changes-to-sports-1.3958508?cache=sazhusyrecmk%3FclipId%3D104056]; See also, The Canadian Press, "Ex-ski coach Bertrand Charest to appeal sex-crime convictions," *CBC,* July 18, 2017: https://perma.cc/FUS2-BZLZ.
[297] Interestingly, before Duncan's 2018 announcement that the system would be intensifying and become more punitive as well as surveillance focused, the SDRCC released a publication delivering the results of its extended examination for the need of a Sports Ombuds in Canada (Sport Dispute Resolution Centre of Canada, *Closing the Loop: A Proposal for a Sport Ombuds in Canada* (Montreal: SDRCC, 2017). The initial call for such a position came in *Win-Win* in 2000 (*supra* note 267). An early report from 2001 described the position:

> Unlike mediation and arbitration, the Ombuds Office would have no authority to resolve disputes or render decisions. Rather it should be positioned as a critical part of, and act as a watchdog for, the sport community, ensuring that its policies are workable, fair and consistent, and that they comply with federal policy (Implementation Committee of a National Alternate Dispute Resolution System for Amateur Sport, *Recommendations for the Implementation of a National Alternate Dispute Resolution System for Amateur Sport* (Ottawa: Government of Canada, 2001) at 20).

In *Closing the Loop* the SDRCC's description of what the Ombuds would do and its structure anticipate some of the synoptic navigation work that the Sport Integrity Commissioner does now, but by 2017 the

ensuring NSOs were fulfilling their obligations relating to maltreatment of athletes, initiated some changes in the shape of these polices.[298]

One of the requirements Duncan announced was that sports must provide access to an independent third party to administer complaints. Duncan's announcement inspired the SDRCC to launch a pilot Investigations Unit to begin assisting sport organizations with abuse complaints.[299] Then in 2021 the SDRCC was awarded the responsibility to build and administrate a new independent safe sport mechanism which would, eventually, become the Office of the Sport Integrity Commissioner or the "OSIC".[300]

In June of 2022, the OSIC opened and began receiving complaints,[301] and its policies and procedures represent a marrying of Sport ADR with the workplace investigation style harassment policies. The complex process involving a formally written complaint, a decision regarding validity of the complaint, a possible investigation, and a possible hearing is reminiscent of the original policy proposed by Corbett.[302] While the

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focus had shifted away from helping people and supporting them to much more focused on complaints and complaint management (see page 11). A closer comparison of *Closing the Loop* and the adopted structure of the OSIC could be the subject of future fruitful research.

[298] Canada, Canadian Heritage, "Minister Duncan Announces Stronger Measures to Eliminate Harassment, Abuse and Discrimination in Sport" (19 June 2018) online: https://www.canada.ca/en/canadian-heritage/news/2018/06/minister-duncan-announces-stronger-measures-to-eliminate-harassment-abuse-and-discrimination-in-sport.html.

[299] SDRCC, *Annual Report: 2018-2019*, Montreal, SDRCC, 2020 [accessible here: https://www.crdsc-sdrcc.ca/eng/documents/SDRCC_2018-2019_AR_EN_web.pdf] at 6: "In reaction to the announcement by the Honourable Kirsty Duncan on June 19, 2018, the Centre established a voluntary fee-for-service Investigation Unit providing access by federally-funded sport organizations to independent third-party investigators to address allegations of harassment, abuse or discrimination. The Investigation Unit is considered an interim measure, implemented in the form of a pilot project until March 31, 2020."

[300] Canada, Canadian Heritage, "Minister Guilbeault Announces New Independent Safe Sport Mechanism" (6 July 2021) online: https://www.canada.ca/en/canadian-heritage/news/2021/07/minister-guilbeault-announces-new-independent-safe-sport-mechanism.html.

[301] Sport Dispute Resolution Centre of Canada. "Office of the Sport Integrity Commissioner to launch first phase of operations on June 20, 2022" (17 May 2022) online: https://perma.cc/GQ5M-V5X2.

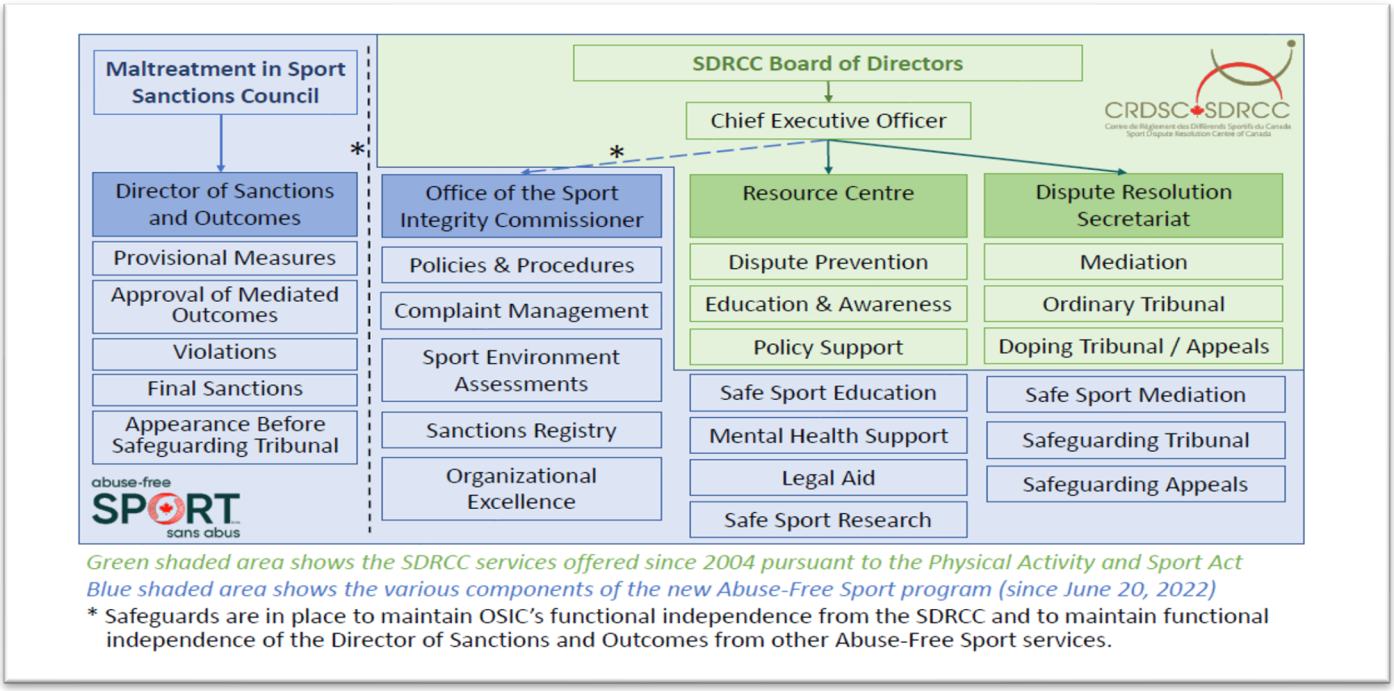
[302] See for example: OSIC, "Process Overview" (www.sportintegritycommissioner.ca,https://sportintegritycommissioner.ca/process/overview, accessed on September 7, 2023).

procedure within the hearings and investigations is supported by relying on the principles embedded in the *Canadian Sport Dispute Resolution Code* created by the SDRCC.[303]

The entire maltreatment response ecosystem is made up of several offices (see image below)[304]. The *Universal Code to Present and Address Maltreatment in Sport* or UCCMS is the central policy for the Canadian[305] response system which is administered by the Office of Sport Integrity Commissioner (the "OSIC") within the Abuse-Free Sport program.[306] Abuse-Free Sport is supported by the SDRCC, and the OSIC is its "central

[303] SDRCC, *Canadian Sport Dispute Resolution Code,* Montreal, SDRCC, 2023 [accessible here: https://crdsc-sdrcc.ca/eng/documents/Code_SDRCC_2023_-_EN.pdf].
[304] Abuse-Free Sport. *About*, Montreal, Abuse-Free Sport, 2022 [accessible here: https://abuse-free-sport.ca/about]. Image URL:
[305] As of the time of writing, the OSIC was only available to national sport organizations which could separately agree to coordinate access with their PSOs. Nova Scotia announced that it would be the first province to sign on to the OSIC, but there have been no substantial developments since that announcement (SDRCC, *Corporate Plan for 2023-2024,* Montreal, SDRCC, 2023 [accessible here: https://www.crdsc-sdrcc.ca/eng/documents/Corporate_Plan_2023_2024_EN.pdf] at 1.)
[306]See also SDRCC, *Corporate Plan for 2023-2024* (SDRCC, Montreal: March 2023) at 2: "The central component of the Abuse-Free Sport program is the Office of the Sport Integrity Commissioner (OSIC), an new independent division of the Centre responsible to administer the UCCMS using trauma-informed processes that are compassionate, efficient and provide fairness, respect and equity to all parties involved. The OSIC is functionally independent from the Centre's management."

hub".[307] Although the SDRCC, Abuse-Free Sport, and the OSIC are all explicitly funded by the federal government, they are not government offices.[308]



The process is complaint driven. The OSIC receives complaints about behaviours which allegedly breach the UCCMS. It assesses those complaints to determine jurisdiction and if any interim measures are warranted; connects the parties to resources for early resolution or mediation; or organizes an independent investigation for the

[307] Abuse-Free Sport, *Office of the Sport Integrity Commissioner*, Montreal, Abuse-Free Sport, 2022 [accessible here: https://abuse-free-sport.ca/commissioner].
[308] Abuse-Free Sport, *Abuse-Free Sport Year One Report*, Montreal, SDRCC, 2023 [accessible here: https://sportintegritycommissioner.ca/files/2023-08-02_Abuse-Free_Sport_Year_One_Report.pdf?_t=1691017763] at 1; SDRCC, *Corporate Plan for 2023-2024,* Montreal, SDRCC, 2023 [accessible here: https://www.crdsc-sdrcc.ca/eng/documents/Corporate_Plan_2023_2024_EN.pdf] at 1; SDRCC, *Annual Report 2022-2023* Montreal, SDRCC, 2023 [accessible here: https://crdsc-sdrcc.ca/eng/documents/SDRCC_2022-23_AR_EN_Final.pdf]. In the audited financials section of this report, the auditor writes: "The organization is economically dependent on government funding for its financial operations" (36).

complaint.[309] In order to ensure independence from the SDRCC, the Director of Sanctions and Outcomes (the "DSO") imposes sanctions not the OSIC. It is also worth noting that there are several different moments along the way wherein a party can appeal or challenge some procedural step or a finding.[310] In most cases, those appeals go to the Safeguarding Tribunal within the SDRCC and are governed by the *Canadian Sport Dispute Resolution Code*.[311]

It is worth noting here that in order to access these services provided by the OSIC, NSOs sign a contract with the SDRCC which requires the NSO to individually gather consent from anyone it wants to come under the jurisdiction of the UCCMS and the OSIC.[312]

Although I focus, here, on the OSIC and its policies, it is the case that, for the most part, its model is typical across Canada. National sport organizations have maltreatment policies for those incidents to which the UCCMS does not apply, and provincial sport organizations each have maltreatment policies as well. These policies share structure and shape with the OSIC Complaint Management Process and typically have an independent

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[309] Abuse-Free Sport, *OSIC Processes*, Montreal, Abuse-Free Sport, 2022 [accessible here: https://sportintegritycommissioner.ca/osic-processes]; and Abuse-Free Sport, *OSIC Policies and Procedures*, Montreal, Abuse-Free Sport, 2022 [accessible here: https://sportintegritycommissioner.ca/policies].
[310] Abuse-Free Sport, *Process Overview*, Montreal, Abuse-Free Sport, 2022 [accessible here: https://sportintegritycommissioner.ca/process/overview].
[311] *Ibid*.
[312] Of the entire Abuse-Free Sport program only the SDRCC is a legal entity with the capacity to contract. Cf. Abuse-Free Sport, *Executive Summary of the Signatory Agreemen*t, Montreal, Abuse-Free Sport, 2022 [accessible here: https://sportintegritycommissioner.ca/files/Summary_of_Program_Sig_Agreement_-_Final_-_EN.pdf] at 1; and Abuse-Free Sport, *Summary of the UCCMS Informed Consent Form*, Montreal, Abuse-Free Sport, 2022 [accessible here: https://sportintegritycommissioner.ca/files/Executive_Summary_UCCMS_Informed_Consent_Form_EN.pdf].

third-party complaint recipient which administers the complaint and connects the parties to investigators, mediators, and/or arbitrators.[313]

The development from Corbett's sample policy into the current independent-third-party model manages to both emphasize how seriously the sport community is taking the problem of abuse in sport as well as remove the responsibility of sport organizations from managing the problem. Donnelly's findings tell us that even after 20 years of opportunity to respond to the call for enhanced policies and procedures to combat harassment and abuse, sport organizations did not respond. The federal government's solution was first to require sport organizations to pay someone else to manage the problem and, second, to build a centralized mechanism to handle complaints based on already existing infrastructure and models.

Although, in some ways, the creation of the OSIC and the requirement of independent third parties seem to imply a greater intensity in responding to the problem of abuse, the outcome of this development, however, is that the sport organizations engage with the specific instances of abuse less frequently. Instead of doing the work themselves, sport organizations pay for some other organization to respond to the issues and harm. In other words, sport organizations transactionally download the work associated with abuse complaints on to others rather than allow it to bog down their

[313] Hockey Canada, *Maltreatment Complaint Management Policy*, Calgary, Hockey Canada, 2023 [accessible here:https://cdn.hockeycanada.ca/hockey-canada/Hockey-Programs/Safety/Safety-Program/Downloads/maltreatment%20complaint-management-policy-e.pdf]; Swimming Canada, *The Discipline and Complaints Policy,* Ottawa, Swimming Canada, 2022 [accessible here: https://www.swimming.ca/content/uploads/2023/01/2022_Discipline-and-Complaint-Policy-UCCMS-Compliant_20221206-1.pdf]; Weightlifting Canada, *Discrimination, Harassment, Bullying and Maltreatment Policy,* Calgary, Weightlifting Canada, 2021 [accessible here: https://weightliftingcanada.ca/wp-content/uploads/2021/11/WCH-Discrimination-Harrassment-Bullying-and-Malreatment-Policy-2021.pdf]; Weightlifting Nova Scotia, *WNS Disciplinary Policy*, Halifax, Weightlifting Nova Scotia, 2022 [accessible here: https://drive.google.com/uc?id=1tc2ra70WfsM9Lwr1_rDIDHR8ji1bBQau].

pursuit of high-performance objectives. The trajectory of early harassment policies to the modern independent third-party model continues to reflect that the sport system is rationalized around the pursuit of high-performance objectives. It reduces harm to rule breaking and treats the solution as a transactional equation which serves the goals of the sport system and not the people involved. It ultimately protects the sport system by allowing a problematic and dangerous sport culture to exist and simply exiting or disposing of people who risk the reputational integrity of the system by *going too far* and/or *getting caught*.

Finally, the modern-day maltreatment policies represent a key moment in the integration of rationalized liberal legalism into sport. These policies are grounded fundamentally in the contractual understanding of relationships as between sport organizations and their members. This contractual relationship gives sport organizations the authority to make decisions relating to discipline and eligibility which negatively affect their membership. At the same time, sport organizations have a responsibility to those members to make decisions about them fairly. When one member harms another member sport organizations must determine if they have the authority to discipline that member, if they should be disciplined, and to what extent. Early harassment policies imagined that sport organizations themselves could handle this tripartite analysis because it would be for their own good to do so. It turns out that it is more efficient and effective for the sport organizations to pay others to do that work while the sport organizations focus on the sport objectives. The result of this development, however, is that the sports are disconnected from the substance of those complaints. Their connection is exclusively

a formal policy and a transactional payment to a service-provider in exchange for a redacted investigator's report and a sanction.

3.5 Summary and Look Forward

I concluded the previous chapter by connecting the rationalization of sport around high-performance objectives to the prevalence of abuse and maltreatment in sport. I want to conclude this chapter by underlining that the development of maltreatment policies is connected to this same rationalization and thereby similarly contributes to the perpetuation of abuse and maltreatment.

The heavy reliance on formal legal rationality in sport reflects its rationalization and reciprocally supports and is supported by rationalizing dynamics like increased professionalization and bureaucratization. It prevents the sport community from considering the nature of the problem and then inhibits its capacity to imagine solutions to the breakdown in relationships and formalizes those breakdowns into disputes around procedure. Harassment and abuse policies which develop in the light of and alongside of formal dispute resolution mechanisms share this structure. We see an individualistic, transactional, and formalistic legalism organize how sport organizations respond to instances of harassment and abuse whereby harassment and abuse concerns are reduced to legal disputes over the definitions of behaviours in a code. The result of this is that sport organizations and the sport system more generally have no relationship to the issues ongoing inside of them outside of concerns of financial cost and of reputational risk which are ultimately market-rational concerns. The focus, in other words, remains on the system and its continued existence.

It bears repeating, by way of conclusion, that there is a consistent refrain in the early harassment in sport literature and guides that policies and disciplinary action should

be not the primary mechanism for dealing with harassment and abuse in sport. For example, Corbett writes in 1994:

> A harassment policy aims to eliminate harassment in sport. Consequently, a change in attitudes and behaviour is the most importance impact the policy can have. While the policy outlines disciplinary mechanisms, this is not the essential ingredient for its success. The values embodied by the policy must become part of the everyday beliefs that guide our behaviours. Only through education and training can these values be instilled in a community… Hence the adoption of a harassment policy must be founded on a commitment to put in place the supporting education components.[314]

Sandra Kirby, one of the early Canadian academics writing about sexual harassment and abuse in sport, echoes this idea and recommends attending to the "poisoned" environment of sport to prevent future harassment.[315] These insights are important because they demonstrates an awareness that the problem of harassment and abuse in sport cannot be solved completely by formalized dispute resolution services which only deals with discrete harassment events. Thus, these harassment and abuse policies contain an internal tension. On the one hand, they describe and construct an adversarial model of truth-seeking devoted to *fairly* sanctioning or not sanctioning someone for a specific act of harassment. On the other hand, these policies profess to describe the values and attitudes of the organization in a way that is supposed to be, presumably, inspirational and, at the same time, deterring. This tension begs the question: how do we connect our responses to instances of harassment, abuse, and/or maltreatment to the *proactive* strategies to prevent this kind of harm and those strategies which create space to heal the relationships after an

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[314] Corbett, *Harassment in Sport*, *supra* note 7 at 7; *Speak Out! ... Act Now!: A Guide to Preventing and Responding to Abuse and Harassment in Sport* (Gloucester, ON: Canadian Hockey Association, 1997) contains similar sentiments in chapter 1. See also, Culture and Recreation Ministry of Tourism (Ontario), *Making It Safer: Preventing Sexual Abuse of Children in Sport*, (Toronto: Province of Ontario, 2002) at 15.
[315] Kirby, *supra* note 274 at 61. Cf. Sport Law & Strategy Group, *Athlete Protection and Maltreatment in Sport: Discussion Paper* (Ottawa: Canadian Centre for Ethics in Sport, 2015); True Sport Secretariat, *Promoting and Advocating for Safe and Welcoming Sport Environments*, (Ottawa: True Sport Secretariat, 2004).

episode of harm? Restorative justice as a relational theory of justice offers us a different way of understanding harm, in general, as well as a way of responding to harm which avoids formalization and takes seriously that any resolution after harm fundamentally requires a proactive attendance to prevention.

CHAPTER 4: FEMINIST RELATIONAL THEORY: A NEW LENS FOR JUSTICE IN SPORT

4.1 Introduction

This chapter provides an overview of Jennifer Llewellyn's feminist relational theory of justice. In particular, I describe the development of the idea of 'just relations' in Llewellyn's work. Understanding the idea of 'just relations' is key to understanding the radicality of Llewellyn's relational theory of justice as a stand-alone theory of justice. It also provides the groundwork for Llewellyn's conceptualization of restorative approach to justice. The next chapter will demonstrate how, when we examine it through this theoretical lens, the OSIC Complaint Management Process is clearly insufficient.

4.2 Feminist Relational Theory

There are three key points that frame and inform my description of feminist relational theory below. Firstly, relational theory is a comprehensive theoretical position which analyzes the ways in which individuals are impacted by their connectedness to one another and larger social phenomena. That is to say, it is relationally focused. Secondly, specifically *feminist* relational theory is about identifying oppressive structures and relationships and transforming them.[316] And, thirdly, Llewellyn's relational theory of justice is grounded in these two premises, and it seeks a version of justice which is an ongoing project of collaborative creation born out of our connectedness and not in spite of it. It asks: given that we are always already in relation and caught up in nested intertwined social structures, what does justice require and how does our relationality play into its achievement?

[316] Christine M Koggel, "Feminist Relational Theory: The Significance of Oppression and Structures of Power" (2020) 13:2 IJFAB: International Journal of Feminist Approaches to Bioethics 49 at 54; Koggel *et al*., *supra* note 21 at 6.

4.2.1 Relationally Focused

Feminist relational theory is a theoretical stance, position, or framework through which we can analyze our existence, what and how we know things, as well as the very norms on which we base our decisions. This analysis begins from the premise that human beings are always already in relationships with one another and that those relationships are, themselves, structured and nested within networks of structural relations.[317] Christine Koggel writes:

> Relationships are inescapable features of our lives. They have an impact on our thoughts and feelings and structure our identities in ways that are unavoidable and imperspicuous. Our identities are structured merely by being members of purposeful and interactive social contexts.[318]

So beyond simply *being in* relationships, for relational theorists, our selves are generated "in and through relationships at interpersonal, institutional and structural levels".[319]

Relational theorists often invoke this premise to distinguish themselves from liberal individualists. Koggel, Llewellyn, and Harbin write:

> In general terms, relational theory can be contrasted with Modern and especially Western liberal accounts of the human being that take the primary unity of analysis to be the individual, who is owed certain rights and freedoms to pursue a rational plan of life without undue interference from the state or others.[320]

Jennifer Nedelsky similarly argues:

> Indeed, the "rights bearing individual" may be said to be the basic subject of liberal political thought. Now, to compress many long, complicated, and different arguments into a sentence or two, what is wrong with this individualism is that it fails to account for the ways in which our essential humanity is neither possible nor comprehensible without the network of relationships of which it is a part.[321]

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[317] Downie & Llewellyn, *supra* note 20 at 4.
[318] Christine M Koggel, *Perspectives on Equality: Constructing a Relational Theory* (Lanham, Maryland: Rowman & Littlefield Publishers, 1997) [Koggel, *Perspectives*] at 142.
[319] Llewellyn, "Transforming", *supra* note 22; See also: Koggel *et al*., *supra* note 21 at 3: "The human self in this view is constituted in and through relationship with others. We define ourselves in relationship to others and through relationship with others."
[320] Koggel *et al*., *supra* note 21 at 1.
[321] Jennifer Nedelsky, "Reconceiving Rights as Relationship" (1993) 1:1 Rev Const Stud at 12.

Robert Leckey notes that this distinction might be overstated and that there are liberals who recognize the "social character of persons"[322], but as Koggel aptly underlines:

> … the real objection is not that liberals deny the relational aspects of selves, but that they do not take these aspects to be relevant to an account of what it is to be a person or to treat people with equal concern and respect.[323]

Koggel's assertion here emphasizes that this not merely a descriptive difference but a redefinition of concepts which have been dominated by a reliance on liberal individualism since the Enlightenment.[324]

Jennifer Llewellyn carefully distinguishes between being relationally focused as opposed to being simply focused on relationships.[325] She explains that:

> This is not to suggest that the details of actual relationships do not matter for relational theorists. On the contrary, relational theorists believe that attention to how actual relationships shape and structure the lives and experiences at individual and collective levels is essential. But this attention cannot be limited to the interpersonal and requires recognition of the significance of relationships at institutional and structural levels as well.[326]

Llewellyn is guarding against the presumption that relational theory is about focusing on relationships in terms of interpersonal dynamics. Instead, relational theory broadens the scope of analysis to include the complexity of how being connected to other individual people as well as being connected to and being within organizations, cultures, and/or institutions impacts our self-understanding as well as the quality of our lives. This relational focus makes possible a deeper attention to the details of relationships and those structures in which they are embedded.

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[322] Robert Leckey, *The Emergence of the Contextual Legal Subject in Family and Administrative Law: An Inquiry into Relational Theory* (JSD Thesis, University of Toronto, 2006) [unpublished] at 6.
[323] Koggel, *Perspectives*, *supra* note 318 at 128.
[324] Catriona Mackenzie and Natalie Stoljar, "Introduction: Autonomy Refigured" in Catriona Mackenzie and Natalie Stoljar eds, B*ook Relational Autonomy Feminist Perspectives on Autonomy, Agency, and the Social Self* (New York: Oxford University Press, 2000) at 11.
[325] Llewellyn, "Transforming", *supra* note 22 at 382.
[326] *Ibid*.

Being relationally focused is about more than just a different perspective but requires a fundamentally relational posture toward others and the world which connects our ethical framework to the inescapability of our connectedness. Caroline Whitbeck tells us that a relational ontology resists the oppositional dualism of theory-practice and, instead, understand itself, literally, as a way of being. She says that the "core practice" is "the (mutual) realization of people".[327] For her, that we are always already in relation demands an ethics based on recognizing other people. These are not relationships of opposition but of analogy. She says that we are "similar or dissimilar in an unlimited variety of ways" without opposing one another.[328] On this account "the scope and limits of that analogy are to be discovered" or "to be mutually created and transformed" not by "struggles to dominate or annihilate".[329] This position radically asserts a stance of outward facing concern and nurturing rather than self-protection or self-sufficiency. Virtuosity develops in and through our capacity to particularize this radical posture of concern toward others and to take stock of what a relational focus reveals for what it means to be well together.[330]

4.2.2 Transformative Potential and Anti-Oppression Origins

Being relationally focused expands our capacity to conceptualize a multitude of philosophical, sociological, and psychological phenomena.[331] For my purposes, however,

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[327] Caroline Whitbeck, "A Different Reality: A Feminist Epistemology", in Carol C Gould, ed, *Beyond Domination: Perspectives on Women and Philosophy* (Totowa, NJ: Rowman & Allanheld Publishers, 1983) at 64-65.
[328] *Ibid* at 75-76.
[329] *Ibid* at 76.
[330] *Ibid* at 65.
[331] For a variety of the development and applications of relational theory see: Koggel *et al*., *supra* note 21; Diana Tietjens Meyers ed, *Feminists Rethink the Self* (London: Routledge, 2018); Jocelyn Downie and Jennifer J Llewellyn, eds, *Being Relational Reflections on Relational Theory and Health Law* (Vancouver: UBC Press, 2012); Mackenzie & Natalie Stoljar eds, *supra* note 324; Ami Harbin, "Bodily Disorientation

I want to focus on the transformative potential of relational theory *vis-à-vis* oppression which is conceptually related to the relational focus. To be clear, by transformative I mean a total systemic change whereby the outcome has entirely novel epistemological assumptions, normative values, and/or metaphysical foundations. The transformative potential of relational theory is an important component of the argument for why a relational turn is necessary in the sport maltreatment context because the problems with the current Canadian response to maltreatment are not simply applying the wrong policies or practices but a systemic and ideological misunderstanding of the nature of the problem.[332]

The transformative potential of relational theory arises out of its profound attention to the way our connectedness shapes and structures our lives. As Jennifer Llewellyn writes:

> This relational theory that I suggest grounds restorative justice is explicitly feminist in the sense that it emerged out of feminist insights about the lived reality of women. As such, it is deeply rooted in the feminist ethic of transformation. In this way, it is a deeply political project aimed at disrupting the structures of power in our ways of knowing and being that have privileged some and resulted in inequality and oppression. Feminist relational theory is, therefore, explicitly emancipatory, anti-oppressive and oriented to transformation.[333]

I will discuss Llewellyn's reference to restorative justice in greater detail below, but for now I want to emphasize the three pieces of her argument in this passage. Firstly, relational theory rises out of the lived reality of women. Early relational thinkers wrote

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and Moral Change" (2012) 27:2 Hypatia 261). For a sense of the early groundwork see: Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 Yale JL & Feminism; Koggel, *Perspectives*, *supra* note 318; Carol Gilligan, *In a Different Voice* (Cambridge: Harvard University Press, 2003); Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press,1990); Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990); Marylin Friedman, *What Are Friends For? Feminist Perspectives on Personal Relationships on Moral Theory* (Ithaca: Cornell University Press, 1993).

[332] I discuss this more in the next chapter.

[333] Llewellyn, "Transforming", *supra* note 22 at 382 (Citations removed).

about the ways in which women, as an oppressed group, have access to, experience of, or, even, are required to live by, a way of being which requires particular sensitivity to relationships and surrounding relational structures.[334] Although this insight comes with references to gender, it is not meant to suggest that gender is the sufficient condition of such understanding. Rather, oppression, in general, notwithstanding the particularities of its leverages, results in a sensitivity to the impacts of social structures on a person's identify, capacities, and values.[335] Relational theory, for Llewellyn, in other words, does not remove gender from the equation, but it helps to contextualize the importance of our connectedness within an oppressive context and also allows us to see the other components of oppression beyond a person's gender.[336]

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[334] Carol Gilligan's early empirical psychological work regarding different ways of conceptualizing and resolving ethical dilemmas is often cited as an early example of relational thinking. Her work describes the difference between a more individualistic account of morality (relied on most often by men) and a more relational one (relied on most often by women) (See: Gilligan, *supra* note 331)). Some feminists concluded that this difference could be linked to the relative social positions of men vs. women (See Leslie Bender, "From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law" (1990) 15:1 Vermont L Rev). Some scholars also cite Annette Baier as an important early thinker in the sphere of care ethics and relational theory (Koggel *et al*., *supra* note 21 at 2). For a more general account see: Maureen Sander-Staudt, "Care Ethics" in *Internet Encyclopedia of Philosophy* (University of Tennessee at Martin, https://iep.utm.edu/care-ethics/: last accessed January 11, 2023); and Kathryn Norlock, "Feminist Ethics" in *Stanford Encyclopedia of Philosophy* (Stanford University, https://plato.stanford.edu/entries/feminism-ethics/, last accessed on January 11, 2023).

[335] Koggel, *supra* note 318 at 152-153. Although not in direct conversation with Gilligan, Susan Sherwin reflects on how the insights of oppressed women are similar to those garnered by a disabled person. Their oppression has different content and axes, but the necessity of relationships and their structural implications are still equally relevant (Susan Sherwin, "Relational Autonomy and Global Threats", in Jocelyn Downie and Jennifer J Llewellyn eds, *Being Relational: Reflections Relational Theory and Health Law* (Vancouver: UBC Press, 2011)). (See also, Jennifer Llewellyn, *The Case for a Unified Approach Oppression* (MA Thesis, Queen's University, 1996) [unpublished]). Finally, it is worth noting that although Gilligan's thinking is often reduced to gender differences in 1986 she issued a reply to criticism wherein she explains that her goal was always just to identify "a moral perspective different from that currently embedded in psychological theories and measures, and it is a perspective that was defined by listening to both women and men describe their own experience" (Carol Gilligan, "A Reply by Carol Gilligan" (1986) 11:2 Signs 324 at 327).

[336] While it is outside the scope of this thesis, it is true that other theoretical positions (e.g. certain indigenous perspectives and critical race theory) share similar insights relating to the importance of our connectedness. For Llewellyn, the importance of the feminist perspective is its inherent politicality not its association with a specific gender.

The second step in Llewellyn's argument is that relational theory's connection to the experience of oppression instills in the theoretical position an ethic of transformation which means, as I understand her, that relational theory is guided by pragmatic anti-oppressive criteria. Put differently: the normative kernel in relational theory is to resist, disrupt, and change oppressive structures. This ethic, crucially, is both a result of and dependent upon the relational focus garnered by the experience of oppression in the first instance. The perspective of an oppressed group reveals that our embeddedness in complex networks of relationships makes them helpful and/or harmful. This knowledge, when it is operationalized, provides a framework for determining which kinds of structures are helpful and which are harmful. The ethic of transformation is therefore, as Llewellyn indicates, specifically anti-oppressive and emancipatory.[337]

Llewellyn concludes her three-part description by saying that insofar as it is centered around disrupting oppression it is a political enterprise which re-affirms the systemic application of relational theory not as a framework devoted exclusively to particular personal relationships but to the ways in which our connectedness structures our lives. The politicality of relational theory distinguishes it further from a personal or individualistic enterprise and re-grounds it in a group or collective project aimed at altering the ways in which we formally organize our societies which can, as necessary, attend to more interpersonal dynamics but is not essentially fixated on them.[338]

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[337] Koggel *et al*., *supra* note 22 at 4 & 6.

[338] Although he is not engaged with Llewellyn directly, Robert Leckey disagrees with this reading of transformative potential in relational theory (*supra* note 322 at 274). The first reason Leckey does not see relational theory as transformative is that he does not think of relational theory as a cohesive whole. He suggests that relational theorists tend to over-state the importance of the "descriptive premise" (what he calls the idea that we are constituted in and through relationships) and the productivity of bringing awareness to relationships while they undersell their methodological emphasis on context and their normative commitment to relational autonomy (*supra* note 322 at 11-15). His overarching aim is to show

A fundamental component of Llewellyn's argument is that relational theorists are not exclusively guided by questions of individual autonomy. Koggel, for example, praises relational theorists who do

> not focus on or get trapped in accounting for the ways in which individual choices and agents could be declared autonomous or nonautonomous from a perspective outside those choices. Instead, they [keep] the focus on relationships that shape choices, relationships that are in turn entrenched in structures and institutions that have power over members of oppressed groups.

She refers in this passage to a recurring self-reflective aspect of relational theory scholarship which argues that relational autonomy as a focus runs the risk of centering individuals as the analytical subject matter rather than the relationships and surrounding structures.[339]

The fact that relational theorists focus on *improving* structures or changing current social arrangements tells us that relational theory contains some way of determining what sorts of structures are *good* and which are *bad.* There is, in other words, an implicit normative analytic to the transformational impulse in relational theory. Koggel *et al* tell us that:

> [relational theorists] are motivated to start with accounts of what is wrong with the world, to establish a clear-eyed sense of existing injustices and, to the extent [they] are able, to offer guidance on actions that can and should be taken within the world as it is, not within an ideal world as we might envision it.[340]

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that the various features or pieces of relational theory can be separated from one another and still be applied productively in a legal context (e.g. to him, the normative commitments of relational theory do not work in administrative law, but its attention to context does) (*supra* note 322 at 274). He resists seeing relational theory as more than just a tool-kit of alternative analytics which improve or gently reform liberalism. Leckey's insistence on an *à la carte* nature of relational theory prevents him from seeing its features as fundamental or radical shifts in understanding and, therefore, he does not recognize its transformative potential.

[339] See for example: Koggel *et al*., *supra* note 22 at 3; Sherwin, *supra* note 335 at 12-14; Nedelsky remarks at the outset of her landmark article on the topic that the "word "autonomy" is so closely tied to the liberal tradition that it is often treated as symbolizing the very individualism from which [she is] trying to reclaim it" (Nedelsky, *supra* note 331 at 10).

[340] Koggel *et al*., *supra* note 22 at 6.

There is a clear sense from this passage that feminist relational theory has a normative component, i.e. it offers a lens through which to identify "what is wrong with the world" and any associated "injustices". Relational theory, however, is *not* about establishing a specific kind of one-size-fits-all best relationship, but about recognizing the impacts, both negative and positive, relationships and their surrounding structures have on people and then, where possible and necessary, improving those relationships and structures.[341]

Before moving on to discuss Llewellyn's relational theory of justice, I want to underline, firstly, that relational theory is a comprehensive theoretical position which, among other things, reorients the very unit of analysis from individuals to the ways in which those individuals are impacted by their connectedness to one another and larger social structural relations. Secondly, it is important to understand that relational theory offers us a way of identifying oppressive structures and relationships and in order to transform them.[342]

4.3 Llewellyn's Relational Theory of Justice

Jennifer Llewellyn's work from 1999 until the present has involved developing a relational theory of justice.[343] Llewellyn argues that current and predominant understanding of justice is organized around classical liberal accounts of individualistic justice and that it is retributive, corrective, and transactional.[344] We should note that these

[341] Koggel *et al*., *supra* note 22 at 6: "[Relational theory] it is not focused on identifying or determining ideal relationship."
[342] Koggel, "Significance of Oppression", *supra* note 316 at 54; Koggel *et al*., *supra* note 22 at 6.
[343] See Llewellyn & Howse, *supra* note 292; Llewellyn, "Legacy", *supra* note 8; Jennifer J Llewellyn and Bruce P. Archibald, "The Challenges of Institutionalizing Comprehensive Restorative Justice: Theory and Practice in Nova Scotia" (2006) 29:2 Dal LJ 297; Llewellyn, "Thinking" *supra* note 23; Jennifer J Llewellyn *et al*, *Report from the Restorative Justice Process at the Dalhousie University Faculty of Dentistry* (Halifax: Restorative Lab, 2015) [accessible here: https://restorativelab.ca/wp-content/uploads/2021/05/RJ2015-Report-dentistry.pdf]; Llewellyn, "Transforming", *supra* note 22.
[344] Llewellyn, "Thinking" *supra* note 23 at 91.

liberal accounts of justice are not dissimilar from the conceptual framing of the dynamics of rationalization which we explored in the previous chapters. In opposition to those accounts of justice, Llewellyn proposes a relational account of justice which, rather than prioritize individualistic notions of freedom, autonomy, and/or recompense, prioritizes creating the conditions for flourishing and wellbeing.[345] For Llewellyn, these conditions manifest in "equality of relationship" or relationships marked by equal respect, concern, and dignity.[346] Wrongdoing, harm, and injustice, on the other hand, manifest in relationships which do not contain these elements and are, therefore, unequal in a relational sense.[347] Relationships which are oppressive and dominating are obvious examples of inequality, but even relationships of neglect impact a person's dignity and show a lack of concern and are, therefore, demonstrative of inequality of relationship.[348] Importantly, these notions of respect, concern, and dignity are relationally grounded, so they should be understood as mutually constituted by virtue of our connectedness not simply because we are rational agents.[349] Llewellyn's goal is to shift our moral intuition away from reaching for liberal constructions of justice to instead reach for a relational understanding of justice which aims at creating equality of relationship instead of inequality of relationship.[350] Although feminist relational theorists often describe themselves in opposition to liberal individualism, it would be wrong to assume they see our relationality as simply a different perspective. For relational theorists our relationality

[345] Llewellyn, "Thinking", *supra* note 23 at 91-2.
[346] *Ibid* at 92-94.
[347] *Ibid* at 95-6.
[348] *Ibid* at 93.
[349] *Ibid*.
[350] Llewellyn & Howse, *supra* note 292 at 70.

is inescapable and once we recognize that fact, we are implored to understand the moral and ethical implications of our connectedness.[351]

Christine Koggel's notion of relational equality is important to Llewellyn's relational theory of justice because equality of relationship is not about the same kind of equality that we see in liberal accounts of justice; it is a relational equality.[352] Koggel describes relational equality as an account of equality which investigates both the specific details of a relationship as well as the context in which the relationship is embedded.[353] It is neither asking questions about formal resource allocation nor is it ascertaining the requisite structural components for equal opportunity.[354] Rather it is asking questions about how the nested sets of relationships in which people find themselves affect and impact those people relative to one another – including relationships at the personal, community, and institutional level. In her earliest work on the topic, Koggel writes:

> Instead of taking the task to be that of determining what moral equals need to flourish and develop as individual and independent entities, relational theory asks what moral equals situated, embedded, and interacting in relationships of interdependency need to flourish and develop. We now understand that making the inherent sociality and interdependence of human beings the starting point for theorizing about conditions for treating people with equal concern and respect changes our understanding of people and of what is needed to achieve equality.[355]

For Llewellyn this plays into her relational theory of justice because, among other things, it tells us that liberal accounts of equality and justice which hold that retribution, for instance, amounts to a kind of *equalization* for a harm suffered is not actually an equalization.[356] Informed by a relational account of equality, a relational theory of justice

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[351] Koggel, *Perspectives*, *supra* note 318 at 145-6.
[352] Llewellyn, "Thinking", *supra* note 23 at 91-2; See also Koggel, *Perspectives*, *supra* note 318 at 70-86.
[353] Llewellyn, "Thinking", *supra* note 23 at 93; See also, Christine M. Koggel, "A Relational Approach to Equality: New Developments and Applications", in Jocelyn Downie Jennifer J Llewellyn, ed, *Being Relational Reflections on Relational Theory and Health Law* (Vancouver: UBC Press, 2012) at 65.
[354] Koggel, *Perspectives*, *supra* note 318 at 73-79.
[355] Koggel, *Perspectives*, *supra* note 318 at 242.
[356] Llewellyn & Howse, *supra* note 292 at 28.

requires us to attend to the context in which a wrongdoing occurred to determine how to untangle the impacts as well as the influence of the nested sets of relationships on the people involved and how to secure equality of relationship by leveraging the structures of those relationships and creating the conditions for equal respect, concern, and dignity.[357]

Context, therefore, is critical for relational theory of justice.[358] Determining whether a relationship or set of relations promote and support equal respect, concern, and dignity *requires* contextualizing those relationships. It requires rooting them to the social structures in which they are *actually* embedded and not abstracting them into manipulable variables. Furthermore, this work is always ongoing because as the relationships shift, the contextual requirements for what respect, concern, and dignity also shift. The relational analysis of justice is an ongoing and hermeneutic engagement with the shifting horizon of contextually-determined conditions of a "mutually modified articulation" of respect, concern, and dignity.[359]

We know from the overview of relational theory that a relational account of justice by its very definition must engage with the nature of justice beyond just interpersonal relationships and reflect on the structural conditions in which those relationships are embedded.[360] This analytical posture reveals relational insights which are part of the thick imbricated texturing of the nested set of relationships surrounding harm. The point is not to absolve someone who has caused harm of their responsibility, but to understand the context in which they did what they did.[361] A relational theory of justice requires

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[357] Llewellyn, "Thinking", *supra* note 23 at 96-98.
[358] *Ibid* at 98-99.
[359] *Ibid* at 94 & 98.
[360] Llewellyn, "Transforming", *supra* note 22 at 382.
[361] For the sake of a starting point, I am using the example of a specific incident of harm, but it is important to understand that restorative justice as a relational theory of justice is not only be reactive to a specific

attention to the broader context in which some harm occurred and, thereby, reveals that injustice can be a specific act, can "mark" a specific existing relationship, and can be a "pattern of relationships without any traceable cause".[362] In Llewellyn's words:

> A relational conception of justice must be concerned not only with inequality resulting from specific wrongdoing but also with the general state of inequality in social relations.[363]

A justice analysis which does not shy away from the broader social implications of an event of injustice can take as its goal broader social outcomes like wellbeing or flourishing. An individualistic justice analysis which seeks to punish, isolate, and/or exchange harm for money necessarily limits the kinds of outcomes it can provide. A relationally conceived justice would begin not by looking to punish wrongdoers but by seeking to understand what an athlete would need, at a personal level, and how their personal needs reflected broader systemic challenges and what those challenges meant for the whole system. Moreover, it would not seek a completed product but recognize that the work of just relations is a "constant and continuing imperative" and requires building and re-evaluation to respond to the context of the relationships involved.[364]

Underlying much of Llewellyn's thinking about a relational theory of justice is this idea that it is not a finished product or end-state but an on-going project. Before 2018, Llewellyn most often refers to the idea of equality of relationship as the goal or central concern of a relational theory of justice, but in her more recent work, she uses the idea of

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incident but can also be applied in the context of unjust systems or cultures. I am focusing on specific episodes here because my thesis is primarily about how the Canadian sport system responds to episodes of maltreatment.

[362] Llewellyn, "Thinking" *supra* note 23 at 97.

[363] *Ibid* at 98.

[364] Llewellyn, "Transforming", *supra* note 22 at 384.

"just relations".[365] Ultimately, I think, equality of relationship and just relations are describing similar things but emphasizing different pieces. This linguistic and rhetorical shift from equality of relationship to just relations emphasizes the theory's goal to transform social structures which can create negative or harmful relationships and are themselves damaging relations. Just relations, in other words, is a way of describing a web of relations which are marked by equality of relationship. Although the underlying concepts of Llewellyn's work on a relational theory of justice remain consistent this is an instructive terminological change which underlines the fact that a relational theory of justice is about more than just individual or discrete moments of harm but about the fact that our relatedness endures and is inescapable. We are not seeking, in other words, justice in the sense of some completed static state. Rather we are seeking just relations which names a kind of perpetual striving toward equality of relationship at both the micro and macro level – recognizing that there is an ongoing feedback loop between those two levels.[366] Llewellyn writes:

> [A relational theory of justice] is not animated by notions of repair and return as the aim of justice; rather, the work of justice understood relationally is to discover what is required to support and sustain just relations in the future. The measure of what is just is also not oriented by the status quo ante but rather by what is required for those involved to be well and flourish.[367]

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[365] The first example of "just relations" in Llewellyn's work is Jennifer J Llewellyn and Brenda Morrison, "Deepening the Relational Ecology of Restorative Justice" (2018) 1:3 International Journal of Restorative Justice 343 at 346. In relation to the idea, she cites her "Thinking", *supra* note 23 and Llewellyn & Howse, *supra* note 292 which suggests that, for her, the idea of "just relations" is present in her earlier work but described in different words. Llewellyn does use the phrase "just relationships" a few times before 2018 (see Llewellyn *et al*, "Imagining Success" *infra* note 375 at 301; Jennifer J Llewellyn and Daniel Philpott, "Restorative Justice and Reconciliation: Twin Frameworks for Peacebuilding", in Jennifer J Llewellyn & Daniel Philpott, eds, *Restorative Justice, Reconciliation, and Peacebuilding* (Oxford: Oxford University Press, 2014) at 21). These references come with a description of equality of relationship however and are quickly rooted in a more structural/relational analysis of justice.

[366] Llewellyn, "Transforming", *supra* note 22 at 382.

[367] *Ibid* at 383.

A relational theory of justice then is about seeking the sustenance for future wellbeing not as isolated atomistic individuals but as *always already relating*.

4.4 Restorative Justice and Relational Theory

According to Llewellyn, restorative justice should be understood as a relational theory of justice.[368] Firstly, it relies heavily on relational premises and understands, in a practice-oriented way, the importance of our connectedness.[369] And secondly it is aimed at disrupting, to various degrees, the current *status quo* arrangement of our current liberal legal system which is often experienced as a failure by those who encounter it.[370] Llewellyn argues that because restorative justice developed, firstly, in practice it never established a conceptual framework, but relational theory can and *should* fill that void.[371] She writes: "when I went looking for an expression of what a relational theory of justice could and should look like, expressed in the world, I found restorative justice".[372]

For Llewellyn the restorative justice movement offers up a set of practices which coalesce around a *thinner* conceptualization of the importance of recognizing our connectedness, while her proposed relational theory of justice provides a thicker set of underlying premises in which we can root restorative practices in order to preserve their relational pitch.[373] In other words, relational theory shifts the way of doing and assessing justice so that the work of justice corresponds more directly to our relational nature.[374] To guide this way of working, Llewellyn derives a set of relational principles which can hold

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[368] Llewellyn & Archibald, *supra* note 343 at 305.
[369] Llewellyn, "Thinking" *supra* note 23 at 89.
[370] *Ibid*.
[371] Llewellyn & Howse, *supra* note 343; See also: Llewellyn, "Thinking" *supra* note 23.
[372] Llewellyn, "Transforming", *supra* note 22 at 381.
[373] Llewellyn, "Thinking" *supra* note 23 at 99-100; Llewellyn *et al*, "Imagining Success" *infra* note 375 at 304; and Jennifer J Llewellyn, "Expanding Our Taste for Coffee and Justice" (2023) 3 International Journal of Restorative Justice.
[374]Llewellyn, "Thinking" *supra* note 23 at 99-100.

up our restorative justice work.[375] The set of principles Llewellyn provides has shifted somewhat over the last decade, but a recent iteration is:

- Relationally focused: resist isolated view of individuals or issues;
- Comprehensive/holistic: take account of contexts, causes, and circumstances and are oriented to understanding what happened in terms of what matters for parties;
- Inclusive/participatory: relational view of parties with a stake in outcome of the situation—those affected, responsible, and who can affect outcome, communicative, dialogical processes that support agency and empowerment;
- Responsive: contextual, flexible practice attentive to needs of parties;
- Focused on taking of responsibility (individual and collective) not on blame;
- Collaborative/non-adversarial;
- Forward-focused: educative, problem solving/preventative and proactive.[376]

When grounded in these principles, Llewellyn argues that restorative justice is an expression of a relational theory of justice. If restorative justice is attended to with these principles flowing through it, then it is a relationally focused enterprise aimed at securing just relations.[377] Responding to questions of justice by applying those principles in an

[375] Jennifer J Llewellyn *et al*., "Imagining Success for a Restorative Approach to Justice: Implications for Measurement and Evaluation" (2013) 36:2 Dalhousie Law Journal 281 at 300-1; Llewellyn, "Responding", *supra* note 8 at 129-30; Llewellyn, "Transforming", *supra* note 22 at 385.

[376] Llewellyn, "Responding", *supra* note 8 at 130. I do not have the space here to discuss the full development of Llewellyn's relational/restorative principles, but in future work some reflection on their development could be instructive. Suffice it to say that her idea of "restorative principles" appears in the *Conceptual Framework* (Llewellyn & Howse, *supra* note 292 at 107) and gains much more substance in "Legacy" (Llewellyn, "Legacy", *supra* note 8 at 293), and, in 2006, Llewellyn and Archibald engage with the restorative justice principles used by the Nova Scotia Restorative Justice Program ("The Challenges of Institutionalizing", *supra* 343 at 331, for example). It is not really until 2013, however, that Llewellyn presents the principles as a list, albeit a non-exhaustive one (Llewellyn *et al*, "Imagining Success", *supra* note 375 at 300). Importantly, I'm not suggesting that the notion of principle-based working was absent from Llewellyn's earlier work. Rather I think it's rhetorically interesting that she chose not to provide a list until 2013. I suspect that this hesitancy comes from not wanting the principles to be misunderstood as fungible values with no practical weight. Instead:

> These principles are at once substantive and procedural… A relational account moves away from the identification of restorative justice with particular processes, thereby rejecting a purely procedural assessment of restorativeness. One cannot, on a relational account, determine restorativeness simply by virtue of the fact that the right elements are reflected in the process. The outcome of the process also matters in measuring success. The ability of a process to be attentive to and affect relationships matters… Indeed, [a relational account of justice] sees the two as fundamentally interconnected and important. The principles should be read in this light as not simply relevant for the procedural elements of a restorative approach, but for its substantive goals and achievements. (*Ibid*).

[377] Llewellyn "Responding,", *supra* note 8 at 130.

attempt to ascertain the conditions necessary for securing just relations will help ensure the answers arrived at and the practices applied are relational.

4.4.1 More than Just Processes

Rather than seeing specific incidents of harm as separate from the structures and systems in which they occur requiring separate solutions, restorative justice processes work in the micro and the macro simultaneously to respond to a given instance of harm while also proactively building solutions for a better way forward.[378] Legal procedures focus on individual behaviour, ignore and neglect the nature of the harm the behaviour created, and aim to punish people for that behaviour – not necessarily the harm.[379] When applied to cases of harm restorative justice processes animated by relational theory do not begin from questions of blame or even individual behaviour. Instead, when guided by Llewellyn's principles, the details of the process evolve and develop in and through intentional reflection on the structure of the relationships involved as well as the needs of the people party to those relationships. The goal is not to determine if someone did a specific thing or if their behaviour meets a specific threshold but to understand what happened in a holistic way. The goal is not to punish people for some past act but to repair, create, or, when necessary, end relationships.[380] This flies in the face of liberal legalistic processes which react to an incident and are organized around complaints about a past action by an individual. The goal for those processes is to determine a simple binary question of whether the person did the conduct alleged. In response to this analysis the process can then *react* by meting out a punishment.

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[378] Llewellyn, "Thinking", *supra* note 8 at 99.
[379] Llewellyn & Howse, *supra* note 292; Llewellyn, "Legacy", *supra* note 8; and Coker, *supra* note 8.
[380] Llewellyn, "Thinking", *supra* note 8 at 103.

Properly understood, principle-based restorative work resists programmatic description because it necessarily must develop out of and in response to the context, causes, and circumstances surrounding harm. To insist that every process contain a specific practice would immediately diminish its relationships to the principles which taken together require a responsivity to the context, causes, and circumstances surrounding harm.[381] Put differently discussions in a circle, for example, are not restorative simply because people sit in a circle or use a talking piece but because the planning and design of the process involved constant reflection on the principles and the relations of those involved. Circles in themselves, therefore, are not restorative but *why* we are sitting in a circle can and must be.[382] This *why* refers back to relational theory's insight that our connectedness is important and has implications for our wellbeing. This relational insight implores us to respond to harm in a way which takes seriously our connectedness not our separation. Sitting in a circle with each other reflects better our connectedness than facing-off adversarially in front of an adjudicator. The circle symbolizes and actualizes our relative equality of position as between one another while an ADR hearing, for example, is about competing for credibility in the face of authority.[383]

Although I have been discussing restorative justice in relational to a specific instance of harm, *taking a restorative approach to justice*[384] is not limited to moments of

[381] Llewellyn *et al*, "Imagining Success", *supra* note 375 at 300.
[382] Professor Llewellyn often quips in presentations that working restoratively is not about how we arrange the furniture.
[383] Cf. Llewellyn, "Legacy", *supra* note 8 at 298.
[384] In "Transforming" (*supra* note 22) Llewellyn uses the phrase "restorative approach" as a way of describing a more thoroughgoing application of restorative justice principles to questions which relate to justice post-harm but also to proactive measures to prevent harm: See, for example, p. 385, nt. 11. The phrase also appears in Llewellyn *et al*, "Imagining Success", *supra* note 375 at 300.

fractured relationships and harm. While restorative justice is a better way of responding to moments of harm, limiting our application of restorative justice to these moments does not fully reflect the relational premise of a relational theory of justice. Firstly, it fails to see that harm "ripples" across relationships and cannot be reduced or siloed into individual instances. Rather harm must be attended to in the context in which it occurs and in the relationships in which it occurs.[385] Secondly, the work of securing just relations requires consistent meaningful effort because, as we discussed above, just relations is not an end state or ideal that occurs and completes the restorative justice process. Rather just relations is a dynamic horizon the nourishment for which grows in the complex interrelations of social relationships and structural relations. Harvesting what is necessary for just relations is an on-going process of applying the principles to social relations to ensure that the relationships at play are oriented toward supporting the flourishing and wellbeing of the people involved. Seen in this light, restorative justice become something we can *and must* apply proactively and on the every-day.[386] As Koggel tells us: "Relational feminists take the work that needs doing to be in the everyday and ordinary activities of engagement with others in dialogue, debate, participation, and learning/unlearning from which understandings emerge of how oppressive structures, norms, institutions, and laws limit opportunities for agency and autonomy."[387]

Interestingly, then, it is by recognizing that the work of justice happens on the every-day and not exclusively in the court rooms with high stakes or at law offices with

[385] Llewellyn, "Thinking", *supra* note 8 at 97.
[386] Prof. Llewellyn often uses this refrain in her presentations about working in a principled way rather than from a tool-kit.
[387] Koggel, "Significance of Oppression", *supra* note 316 at 53.

high retainers that we begin to be transformative. What justice requires is not limited to obligations in the absence of justice but is also about adjusting and transforming systems which perpetuate everyday injustices and are not conducive to the securing of just relations. Llewellyn writes:

> As a relational approach, restorative justice insists on attention to injustice at the systemic and structural level and a focus on what is required at this level to support and sustain just relations. Justice cannot, then, be achieved on a relational restorative account simply by dismantling unjust systems and structures. The work of justice requires building systems and structures as needed to secure the conditions for just relations. The power and responsibility to bring about fundamental change in our relations at individual and structural levels rest with social networks – in the groups, communities and cultures in and through which we live.[388]

Transformation is not, in other words, the product of destruction alone but of disruption coupled with rebuilding in ways guided by the goal of creating the conditions for equal respect, concern, and dignity. We are not attempting to codify behaviour with new mechanisms of compliance. Rather we are looking for structures which will support relationships containing respect, concern, and dignity. Those structures will allow relationships to form which nourish and sustain future wellbeing. This is transformative because it shifts the goal of systems from individual static achievement to the dynamic and on-going *poesis* of equality of relationship.

4.5 Responding to Relational Harm with Restorative Justice

On a relational account, harm, properly understood, cannot be excised from the context in which it occurs.[389] A restorative justice process which operates along a relational theory of justice must work to understand the impact of our connectedness on individual choices.[390] This understanding can then yield answers for how to repair

[388] Llewellyn, "Transforming", *supra* note 22 at 386.
[389] Llewellyn, "Legacy", *supra* note 8 at 282.
[390] *Ibid* at 293-4; Llewellyn, "Thinking", *supra* note 8 at 94, 96, & 98.

relationships on a broader scale than just those most directly affected by some instance of harm. Restorative justice processes, in other words, live into the notion of a relational theory of justice by becoming the on-going means to create just relations.[391]

In this section I want to think through two large scale applications of restorative justice as a relational theory of justice. I draw out how restorative justice provides us with both practical and theoretical guidance for responding to harm understood as relational and in a relational context. This response, therefore, necessarily engages with the context of the harm and aims to improve the cultural structures which likely contributed to the harm occurring at all. The point of this section is to provide examples of how the abstract theoretical ideas can be translated effectively into practical processes.

4.5.1 Dalhousie Dentistry

The Restorative Process at Dalhousie's Faculty of Dentistry[392] provides us with a good example for seeing how the culture of an institution or organization or university faculty can contain different layers of harm and harmful conduct. It is only by peeling back those layers that we can begin to understand the nature of the harm experienced and, at the same time, it is only by understanding the scaffolded nature of the harm that we can begin to imagine solutions. The facilitators' report that the sexism and misogyny of the

[391] Llewellyn, "Legacy", *supra* note 8 at 293-4; Llewellyn, "Thinking", *supra* note 8 at 94, 96, & 98.
[392] Llewellyn *et al*, *Dentistry*, *supra* note 343 at 2:

> In December 2014, female students in Dalhousie University's Faculty of Dentistry filed complaints under the University's Sexual Harassment Policy after they became aware some of their male colleagues had posted offensive material about them in a private Facebook group. The select materials revealed from the Facebook group reflected misogynistic, sexist and homophobic attitudes. At the complainants' request, the University began a restorative justice process to investigate the matter, address the harms it caused and examine the climate and culture within the Faculty that may have influenced the offensive nature of the Facebook group's content. Twenty-nine students from the class of DDS2015 (out of 38 in the core four-year program) participated in the restorative justice process. This included 12 of the 13 men identified as members of the Facebook group when the offensive material was discovered. Fourteen women and three other men from the DDS2015 class also participated in the process over the last five months.

Facebook group echoed the culture of sexism between classmates which was itself a further duplication of the sexism the class experienced while working in clinic.[393] They insist that the culture of the Faculty of Dentistry required examination in order to make sense of the harm experienced by the women targeted in the Facebook group.[394] The behavior of the men in the Facebook group could only be fully understood in the context of the sexism of the Faculty itself because the harm stemming from the sexist and misogynistic Facebook posts resonated with the systemic harm and injustice the women targeted experienced on the everyday. The facilitators write:

> The investigators found no evidence to suggest that any of the men involved in the Facebook group exhibited abnormal characteristics – in short they were not "monsters" or "bad apples." Indeed, what is significant is they were quite clearly not bad men lacking in values or a moral compass. Thus, the restorative justice process was not tasked with transforming bad men into good ones. Rather, it had to wrestle with how "good" men could say these things….[395]

Importantly, this does not absolve those participating in the Facebook group of their responsibility for the harm they caused, but it creates a broader understanding which takes seriously the relational nature of human existence. If the goal of a relational theory of justice is ensuring things go right more often on the everyday, then reflecting on and improving the cultural undercurrents which give rise to or normalize harm becomes a necessary part of any justice-seeking pathway. Llewellyn frames this same point in relation to Residential Schools. She writes:

> [I]t is not possible to address the harm victims experienced without understanding the roots and purposes of the residential school system as a whole. The sexual and physical abuse suffered by Aboriginal children in residential schools cannot be understood in isolation from the cultural and spiritual abuse that was the *raison d'tre* of the system.[396]

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[393] Llewellyn *et al*, *Dentistry*, *supra* note 343 at 46-47.
[394] *Ibid* at 46.
[395] *Ibid*.
[396] Llewellyn, "Legacy", *supra* note 8 at 291.

The point is that restorative justice guided by a relational focus *examines the forest in order to better understand the trees*. Analyzing the cultural context around harm tells us more about the nature of the behaviors which caused harm as well as provides us with a more relationally grounded pathway to justice than punishing individual people.

Grounded in relational theory, the restorative process at Dalhousie leveraged the understanding it garnered about the culture of the Faculty of Dentistry to work to create just relations in that faculty going forward.[397] It is not enough, in other words, to simply identify that the culture created space for the men to post the things they did. Rather, restorative justice is also about determining and designing the steps for supporting the requirements for justice and just relations in the context at issue. The facilitators helped the participants develop a series of "ideas and commitments" to move forward which are not meant to be a programmatic agenda but generative of a shift in approach.[398] They write:

> The ways forward were considered through the lens of the five themes related to culture and climate: i) community building, ii) inclusion and equality, iii) professionalism and ethics, iv) curriculum and program structure and v) reporting processes and conflict resolution. These themes are of course significantly interrelated as are the ideas, recommendations and commitments proposed. While this separation is organizationally helpful, a focus on addressing one theme will inevitably have significant impacts on one or more of the others. Indeed, effecting change in culture and climate cannot be achieved by one idea, redesign or reform. There is no one issue that stands above the rest as the linchpin for positive culture and climate change. Such change requires a multipronged, flexible and sustained effort to doing things differently in the future.[399]

The overarching goal of the next steps contemplated under these themes was to establish a culture of "respect and belonging".[400]

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[397] Llewellyn *et al*, *Dentistry*, *supra* note 343 at 57ff.
[398] *Ibid* at 55.
[399] Llewellyn *et al*, *Dentistry*, *supra* note 343 at 58.
[400] *Ibid*.

In this example, we can also see that Restorative justice is not oriented toward the delivery of justice as punishment, retribution, or restitution but toward supporting those affected by injustice (including those who responsible) to collaboratively design and create the conditions for justice going forward. The facilitators state that:

> The restorative process underscored that all participants – the students, Faculty, University, profession and community – have responsibilities to enact change in culture and climate to secure safe and inclusive communities marked by mutual respect, concern and care…
>
> … All students, but particularly the men in the process, have expressed interest in supporting future students at orientation or annual events within the Faculty to speak about what they have come to understand about misogyny, sexism, homophobia and racism, the importance of ensuring inclusive and supportive communities, and how they have come to think differently about professionalism… [401]

Thus, the outcome of the restorative process, in part, was not that the men were punished or made an example of for deterrent purposes. Rather, the outcome was a recognition of a problematic culture and a set of commitments from a variety of people within the university context to take steps to improve that culture.

Importantly, the men at the center of the Facebook group were not 'let off the hook' but were deeply impacted by the process. Rather than feel embittered and resentful, they were included in being part of the positive change going forward. In their joint statement the members of the Facebook group write:

> We know that many people want to know who the worst among us are and who the more "innocent" by-standers are. The truth is, none of the Facebook group members are innocent but nor are we monsters. Despite how we have been portrayed in the media, we care deeply about our classmates, Faculty, University, our patients and our communities. Within the restorative justice process we have come to accept our personal and shared responsibility for the fact that over the three and a half years, as members of the Facebook group, we did not examine the harmful ways in which we were building connection with one another. We are more, though, than what we were shown to be in the limited selection of Facebook posts or in the public response on social and mainstream media. Accepting our personal shortcomings has been

[401] Llewellyn *et al*, *Dentistry*, *supra* note 343 at 57-58.

> difficult but necessary as we work toward being the image that we want to portray in our private, public and professional lives.[402]

The female participants in the restorative process expressed similar sentiments in their statement:

> Restorative justice provided us with a different sort of justice than the punitive type most of the loudest public voices seemed to want. We were clear from the beginning, to the people who most needed to hear it, that we were not looking to have our classmates expelled as 13 angry men who understood no more than they did the day the posts were uncovered. Nor did we want simply to forgive and forget. Rather, we were looking for a resolution that would allow us to graduate alongside men who understood the harms they caused, owned these harms, and would carry with them a responsibility and obligation to do better.[403]

In both of these passages we see a recognition that the restorative process allowed the participants to make sense of the harm caused by the Facebook group in order to transform the culture which normalized and created the opportunity for sexism and misogyny more broadly.

4.5.2 The Restorative Inquiry

The Restorative Inquiry for the Nova Scotia Home for Colored Children (the "Restorative Inquiry" or "RI") shows us what happens when an institution betrays and/or fails those it is meant to serve.[404] This is another aspect of the relationality of harm which is not accounted for in liberal legalism and which occurs in the sport context as well. Understood relationally, harm may not be attributable to a specific source or cause.[405] It

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[402] Llewellyn *et al*, *Dentistry*, *supra* note 343 at 11.
[403] *Ibid* at 9.
[404] The Council of Parties, *Journey to Light: A Different Way Forward*, (Halifax: Government of Nova Scotia, 2019) [accessible here: https://restorativeinquiry.ca/report/Restorative-Justice-Inquiry-Final-Report.pdf]. [*Journey to Light*]: The Nova Scotia Home for Colored Children ("NSHCC") opened in the early 1900s as "a private child caring institution established to care for orphaned and other African Nova Scotian children in need" (See: The Restorative Inquiry. *History and Context*, Halifax, Restorative Inquiry, 2019 [accessible here: https://restorativeinquiry.ca/report/Restorative-Justice-Inquiry-Final-Report-History-and-Context.pdf]). It operated until 2015, but, in 1998, several former residents came forward to report the abuse they suffered while living at the home (*Ibid*). The Restorative Inquiry "was established following a 17-year journey for justice by former residents of the Nova Scotia Home for Colored Children… It was established under the authority of the *Public Inquiries Act* following a collaborative design process involving former residents, Government, and community members" (*Journey to Light* at 3).
[405] Llewellyn, "Thinking", *supra* note 8 at 97.

may be a system or the way an institution responds to a system which causes harm. This does not mean that harm is either done by a system or an individual as if they are mutually exclusive sources of harm. Rather the RI shows us the connection between systemic harm and individual instances of harm.

The NSHCC's culture created the conditions within which the more salient sexual and physical abuse instances could occur. The Commissioners for the Inquiry wrote in their final report called *Journey to Light*:

> As former residents came forward to share their experiences, the complexity of the story became clear. What they shared were not simple stories of harm and abuse visited upon them by predators or individuals set about violence or violation. It is undeniable that this was an element of the abuse that occurred within the Home, yet, if this was the only focus of justice efforts, much of the harm and abuse experienced by former residents would be missed. Such a narrow view of the history of neglect, harm, and abuse at the Home would ignore significant factors related to the contexts, causes, and circumstances that created the conditions in which such abuse was able to happen.[406]

For much of its existence, the NSHCC regularly failed to meet the needs of the children in its care at the most basic levels, including insufficient heating, clothing, food, activities/programming, as well as physical and emotional safety.[407] This is systemic harm meaning that the ways in which the NSHCC caused harm to the residents was part of its function; harm was part of the system. Although it was people who did not provide sufficient heat, clothing, food, activities, or safety, this lack is rooted, at least in part, in the conditions, circumstances, and history surrounding the NSHCC more broadly. Like with Dalhousie Dentistry, the question is not *only* about those specific failures but about why they were allowed to happen.

[406] *Journey to Light*, *supra* note 404 at 316-17.
[407] *Ibid* at 153-169.

We can learn from the Restorative Inquiry that fixating on so called 'egregious' or 'severe harms' misunderstands the connection between systemic harm and those instances of harm. Justice in the wake of systemic harm is not as simple as reacting only to the worst things that happened. Rather, as the authors of the report say:

> It is important to pay attention to the conditions and circumstances in which harm and abuse were commonplace. … [I]t is not possible to understand the nature of institutional abuse if we approach the problem simply through an individual lens. It is significant that the abuse and harm happened in and through institutions. Of course, there were individuals who caused harm — intentionally and unintentionally — some out of a belief their actions were a necessary part of doing their job, and others who clearly preyed on children and young people to serve their own ends. Attention to the systemic and institutional features of abuse in the Home is not intended to excuse individuals from their responsibility for their past actions and, importantly, their responsibility to respond in meaningful ways for the future. It is important, however, that we focus on the systemic and institutional nature of the abuse, and the response to abuse, if we are to be able to explain how the abuse happened and the failures to respond in helpful ways. Such an explanation requires attention to the system and structures of child welfare, the Home, and the justice system through which help was sought to address abuse. This points to the significant collective responsibility we all share at the institutional, system, and societal levels for what happened to former residents at the Home.[408]

By paying attention to the underlying systemic causes of harm we can better respond to individual instances of harm and try to prevent it in the future. Recognizing this connection between discrete instances of harm and the structures in which they occur requires a relational posture of examination essential to restorative justice.

In this section we explored to large scale applications of restorative justice as a relational theory of justice. We can now see how restorative justice provides us with both practical and theoretical guidance for responding to harm understood as relational and in a relational context. This response understands the harm in and through its context and aims to improve the structural relations which likely contributed to the harm occurring at all.

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[408] *Journey to Light*, *supra* note 404 at 321.

4.6 Summary and Look Forward

This chapter has provided an understanding of the theoretical framework I will be applying to critique the model used by the OSIC which develops as a logical result of the cultural origins described in chapters 2 and 3. That is to say that rationalization of sport which contributes to the adoption of legal logic and legal thinking create a space in which the OSIC and the UCCMS seem like the logical way of responding to the question of maltreatment. The mechanisms for responding to harm are built on the logic and principles of an individualistic and transactional understanding of justice which *cannot* attend to or even interrogate the root causes of maltreatment in the way that a relational theory of justice demands of us.

The next chapter of this thesis applies relational theory and restorative justice as critical lens through which we can reveal the inadequacies of the OSIC Complaint Management Process. Through this analysis it becomes even clearer why restorative justice as a relational theory of justice is better suited for responding to the problems facing sport than the liberal legalism in which it is currently embedded. In the final chapter I provide an account of what it might take in sport to shift the system and social and structures in ways that, on the one hand, better respond to instances of maltreatment, but, on the other hand, create transformative opportunities to proactively prevent future maltreatment.

CHAPTER 5: A RELATIONAL CRITIQUE OF THE OSIC COMPLAINT MANAGEMENT MODEL

> *We need to demand that all Safe Sport initiatives contribute towards the support, justice, and healing for those who have been harmed. Otherwise, we need to take a hard look in the mirror and ask ourselves, what is the point?*[409]

5.1 Introduction

Feminist relational theory provides a lens through which we can see that maltreatment is properly understood not individualistically but in terms of our connectedness to one another and structural social relations. This relational framing of maltreatment is borne out in the empirical research.[410] The evidence tells us that maltreatment is a deeply systemic and cultural problem irreducible to decontextualized bad actors.[411] In a recent prevalence study, the researchers concluded:

> Importantly, the findings of this study indicate significant positive correlations between the various forms of harm, suggesting that an environment that is conducive to one form of harm is likely conducive to many forms of harm. Together, the findings of the current study and the extensive body of literature noting the lack of power and autonomy experienced by athletes […] suggest that the characteristics of the sport environment that leave athletes vulnerable to potentially harmful experiences need further attention.[412]

This passage points to the reality that describing maltreatment at an empirical level and being able to respond to it requires recognizing that incidents of maltreatment are generated and formed in and through the culture of the sport environment. It is naïve to assume, therefore, that maltreatment occurs outside of a context exclusively in the guilty minds of bad actors.

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[409] Dixon, *infra* note 423 at 34.
[410] Some researchers refer to relational vs. non-relational maltreatment which they distinguish based on the importance and/or proximity of the relationship between someone abused and their abuser. I am not following this terminological convention. Relational, for my purposes, refers to feminist relational theory which is a broader definition of the idea as explain in the previous chapter. See, for example, Wilson *et al*., *supra* note 4 at 2.
[411] Kirby *et al*., *supra* note 11; Wilson *et al*., *supra* note 4; Kerr *et al*., "Systemic Issue", *supra* note 2; Jacobs *et al*., *supra* note 11; Gervis & Dunn, *supra* note 11; Robinson, *supra* note 277.
[412] Wilson *et al*., *supra* note 4 at 15. (Citations omitted).

A key component of the systemic nature of maltreatment is that it is normalized.[413] This is important to consider when responding to maltreatment because normalization is more than just the bare prevalence or ubiquity of maltreatment but the cultural acceptance of the behaviour. It creates what some researchers refer to as the "dome of silence".[414] Within the dome of silence

> athletes who are [abused] are most likely to find a wall of silence around them, where the person they would normally confide in is the abuser who exploited them, or their friends and associate of the abuser, and where their teammates are unsure about believing them. Within the dome of silence, athletes are unlikely to take action on behalf of their peers, fearing their own career jeopardy.[415]

It is not as simple as reporting maltreatment in order to achieve safety. Reporting maltreatment or even admitting that it is happening could be seen as the abnormal or deviant behaviour rather than the abuse.[416] The normalization is so complete in fact that some researchers "posit that athletes learn to accept inappropriate behaviors during their careers but, upon reflection in retirement, reappraise these experiences as harmful."[417]

The evidence that maltreatment is normalized and systemic is an indictment of the way sport organizations administer and deliver sport as well as the values insisted upon by multi-sport organizations which support the sport system. It undermines the assumption that people who abuse athletes are isolated lone wolves infiltrating sport with

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[413] Jacobs *et al*., *supra* note 11;
[414] Kirby *et al*., *supra* note 11.
[415] *Ibid* at 119; See also: Hartill, *supra* note 10; Wendy MacGregor, "The Silenced Athlete Voice Responding to Athlete Maltreatment through Empowerment and Education" (2021) 30:1 Educ & LJ 117; and MacGregor, *supra* note 11.
[416] Only 15% of those who experienced some form of abuse or discrimination reported it to the sport organization (Gretchen Kerr *et al.* "Prevalence of Maltreatment among Current and Former National Team Athletes" (Athletescan.ca, 2019) [accessible here: https://athletescan.ca/wp-content/uploads/2014/03/prevalence_of_maltreatment_reporteng.pdf] at 4; and, more generally, at 44).
[417] Wilson *et al*., *supra* note 4 at 16.

the intent to abuse.[418] Instead, what we see is a culture of high-performance that encourages the most common abusive behaviours[419] which are psychological maltreatment (e.g. public humiliation or being intentionally ignored) and neglect (e.g. training while injured/exhausted or sacrificing career/education for the sport).[420] These behaviours most commonly come from coaches while peers are the most common source for sexualized violence or sexual harm.[421] These data do not support the inference that sport is an innocent community targeted by people who want to abuse children. Rather the data suggest that the culture of sport encourages coaches to be excessively authoritarian and "tough" on athletes in order to elicit higher performance.[422] This creates an environment which normalizes and encourages competition between peers to avoid punishment and renders people vulnerable to harm from their peers.

Thus, overwhelmingly, the evidence tells us that maltreatment in sport is *not* reducible to individual behaviour and, correspondingly, it is a product of the culture and context in which it occurs. Llewellyn's relational theory of justice helps us see that we must respond to maltreatment in a way that responds to the totality of maltreatment, i.e. respond to each episode while responding to the total problem and respond to the totality

[418] Calvin Nite and John Nauright, "Examining Institutional Work That Perpetuates Abuse in Sport Organizations" (2021) 23:1 Sport Management Review 117; Victoria Roberts *et al*, "Organisational Factors and Non-Accidental Violence in Sport: A Systematic Review" (2021) 23:1 Sport Management Review 8;
[419] See Roberts *et al*., *supra* note 418 at 20.
[420] Wilson *et al*., *supra* note 4 at 11.
[421] *Ibid* at 13-14; 17. See also Robinson, *supra* note 277: with regards to the way athletes harm other athletes and their intimate partners and the connection of that harm to sport culture.
[422] Wilson *et al*., *supra* note 4 at 18; Paul Potrac *et al*, "'It's All About Getting Respect': The Coaching Behaviors of an Expert English Soccer Coach" (2010) 7:2 Sport, Education and Society 183; Yvette P. Lopez *et al*, "The Effect of Abusive Leadership by Coaches on Division I Student-Athletes' Performance: The Moderating Role of Core Self-Evaluations" (2021) 23:1 Sport Management Review 130; Jacobs *et al*., *supra* note 11; Anthony Vincent Battaglia *et al*, "Youth Athletes' Interpretations of Punitive Coaching Practices" (2016) 29:3 Journal of Applied Sport Psychology 337; Gervis & Dunn, *supra* note 11; Roberts *et al*, *supra* note 418.

of the problem in a way which anticipates and aims to prevent episodes of maltreatment.[423]

The OSIC Complaint Management Model does not respond to maltreatment in this way. It is part of the broad integration of legal logic into sport as well as the increasing reliance on formalized ADR procedures and ADR professionals.[424] The issues that this system purports to resolve are issues that might otherwise make their way to courts as either civil litigation or in the criminal legal system. It is not surprising then, that many principles, methods, and procedures which hold up the criminal and civil litigation system show up in the OSIC processes as well. It is designed to react to discrete episodes of maltreatment as if punishing individual bad actors for a specified behaviour achieves the goal of eliminating and preventing maltreatment.[425]

The OSIC Complaint Management Process and the UCCMS which it administers are both implicitly organized around individuals as the central unit of concern. They are grounded in a liberal legalism which is concerned with the behaviour of individuals irrespective of their social contexts. Furthermore, victims of maltreatment in this system are also understood as isolated individuals. This system does not contemplate that groups of people can experience the same harm or that the harm of one person could indirectly affect others; it only contemplates individual victims or complainants. This is consistent

[423] This analysis would not be possible without the research of Stephanie Dixon whose recent master's thesis provides important and nuanced insight into the experiences of athletes who recently engaged with a formal reporting mechanism similar to the OSIC model or specifically with the OSIC: Stephanie Anne Dixon, *Athletes' Experiences of Addressing Maltreatment through a Reporting Process: A Critical Narrative Analysis as Guided by Trauma-Informed Practice* (MSc Thesis, University of Toronto, 2022) [unpublished].
[424] See Chapter 3.
[425] See Hartill, *supra* note 10; and Roberts *et al*, *supra* note 418.

with the dynamics of rationalization (as discussed in chapters 2 and 3) out of which this complaint mechanism ultimately grew.

5.2 Individualistic Focus

The first aspect of Canada's current maltreatment response mechanism that I will focus on is its individualistic focus. This focus is also a key component of Llewellyn's critique of ADR and civil litigation is that they are both focused on individuals and individual behaviour. She provides an analysis of ADR's indebtedness to the logic underlying civil litigation and demonstrates the way the failings of civil litigations reappear in ADR.[426] To Llewellyn, ADR's major failing is that it is individualistic as well as adversarial and bipartisan which hinges on a transactional notion of corrective justice and aims to correct an injury typically with a financial reward or some sort of material recompense.[427] This version of justice narrowly focuses on the individual harmed and forces parties to compete with one another to mitigate or exaggerate the amount of damages (i.e. material compensation) at issue.[428] In this context, truth and justice become synonymous with winning which, of course, is not a far cry from the subsumption of ethics into a high-performance sport system.

Donna Coker's critique of Crime Logic also reveals a commitment to individualism which we can see in the way the UCCMS and the OSIC Complaint Management System mimic the criminal law and attempt to regulate how individuals *choose* to behave. Coker writes:

> Crime Logic is reflected in (1) a focus on individual culpability rather than on collective accountability; (2) a disdain for policy attention to social determinants of behavior; (3) a preference for narratives that feature bad actors and innocent victims; and (4) a preference for

[426] Llewellyn, "Legacy", *supra* note 8 at 282.
[427] *Ibid* at 278 nt 82.
[428] *Ibid* at, for example, 281 and 284.

> removing individuals who have harmed others as though excising an invasive cancer from the body politic.[429]

We can see these characteristics of Crime Logic throughout the OSIC Complaint Management System as well as the UCCMS.

Let us turn now to the UCCMS where we see some initial evidence for the individualistic focus which both Llewellyn and Coker find so deeply troubling. The definition of maltreatment focuses on the individual's *choice* to mistreat others and their intent. It creates a narrative of a person who chooses to do something which harmed or could have harmed someone. It simplifies the analysis of responsibility for a harm by making it about the choice to act. The definition of maltreatment in the UCCMS is:

> A volitional act and/or omission described in Sections 5.2-5.6 that results in harm or has the potential for physical or psychological harm.[430]

This definition narrows the analysis of the behaviour to an individual's decision without accounting for the context, causes, or circumstances around that decision. The definition also requires that a person be injured or that they could have been injured for the behaviour to qualify as maltreatment. The requirement of harm is logical because it creates an objective criterion for analysis, i.e. if someone does intentional harm in sport, then their behaviour is likely maltreatment.[431] *Potential for harm*, however, broadens this definition to include a more interpretive standard, so if someone's attempt to do harm

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[429] Coker, *supra* note 8 at 156. Citations removed.
[430] UCCMS, *supra* note 24, at Appendix I: Definitions, s i.
[431] The definition of maltreatment includes several sub-categories: psychological maltreatment (s. 5.2), physical maltreatment (s. 5.3), neglect (s. 5.4), sexual maltreatment (s. 5.5), and grooming (s. 5.6). The expanded definitions of each type of maltreatment do not serve any other purpose in the UCCMS than to provide specific examples of kinds of behaviour that qualify as maltreatment. It is not the case, in other words, that one type of maltreatment carries a different analysis or proof standard; they are simply examples of prohibited behaviour. It is important to note that although the overarching definition of maltreatment requires the action be volitional, the sub-categories of psychological maltreatment and physical maltreatment do not require intent to harm. Intent, therefore, refers not to the harm itself but the intention to commit the act which may or may not cause harm. Again, this is not about reducing harm or understanding the impact of the harm but about controlling, regulating, and/or dictating behaviour (See UCCMS, *supra* note 24 at ss 5.2.2 & 5.3.2.)

fails their behaviour *remains* maltreatment. This is similar to the idea behind charging people criminally with attempted murder[432] or attempted assault[433]. The idea behind these criminal laws is to ensure that even people who are unsuccessful in their attempts to commit a crime can be found guilty of the attempt. This emphasizes the degree to which this definition is about controlling and reacting to the behaviour of individuals not about the harm they cause or the circumstances around their decision. Ultimately, this kind of definition or conceptualization of maltreatment makes it easier to find violations in someone's behaviour.

The individualistic focus of the OSIC Complaint Management Process is not limited to the respondent side of the equation. As I discussed briefly above, complainants, too, are made to feel isolated as if the harm they experienced is separate from and different from the harm others have experienced. It is about their individual harm. Llewellyn specifically criticizes civil litigation system and of ADR for their over-emphasis on the individualized and discrete instances of harm which do not allow for a capacious and relational understanding of harm. She writes:

> The harm at issue is restricted to that suffered by the individual plaintiff. No account is taken of a broader conception of harm that might include harm experienced vicariously by members of the victim's family or community, or of harm experienced by the wider community as a result of the breakdown in the relationship between the victim and the wrongdoer.[434]

We see evidence for this in an account by a person involved in this system. One of Stephanie Dixon's athlete-collaborators recalls how isolating it felt to be on a team of women who knew about her abuse and likely suffered similar abuse, but she could not

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[432] *Criminal Code*, RSC 1985, c C-46, s 239(1).
[433] *Ibid* at s. 265(1)(b).
[434] Llewellyn, "Legacy", *supra* note 8 at 271. For a discussion of this individualistic understanding of harm in the context of residential schools see pg. 280.

tell them that she had made a complaint.[435] Even though their experiences of harm were connected, they were isolated from one another *by the rules and mechanisms of the system* until the other women who had been abused came forward.[436] By restricting the communication of complainants through confidentiality clauses and only contemplating maltreatment as individual moments of harm, the OSIC and the UCCMS inhibit the system's capacity to respond to the totality of the harm at issue.[437] It focuses, instead, on specific instances of harm in the past and prevents us from learning for the future.

Confidentiality and privacy have a complicated position in this system because they can be framed as protections for those involved in a complaint (and are to some degree), but it is also clearly better for the system itself if some things are kept private. It requires us to make blanket assumptions about what ought to be kept secret which makes it difficult for the nuances and details of an episode of harm to move beyond the complaint itself. This inhibits the capacity for those who want to shift culture to do that work because the evidence that something needs to change is bound up in privacy concerns. Of course, it is not the case that everything should be out in the open with perfect unfettered transparency, but if we are to move beyond the individualistic and transactional modes of reacting to maltreatment then we need a more substantive and responsive way of understanding who needs to know what and when something can be cured by sunlight.

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[435] Dixon, *supra* note 423 at 110.
[436] *Ibid* at 112.
[437] See Office of the Sport Integrity Commissioner, *OSIC Confidentiality Policy,* Montreal, OSIC, 2022 [accessible here: https://sportintegritycommissioner.ca/files/CONFIDENTIALITY-POLICY-2022-06-20.pdf].

Where this individualistic focus ignores collective accountability which a relational approach to maltreatment would require, restorative justice and relational theory offer us a way re-grounding this work of justice in the community. In this way the operative question is not about demonstrating that a person's behaviour crossed a line for the purpose of punishing them. Rather, if we accept the notion that we are relational beings, then the work of justice is about the collective action of the community.[438] This is about building a justice which takes seriously our connectedness and values our experiences as a more practical and radical source of for understanding of how to be together.

The UCCMS, however, does not contemplate the possibility that a sport organization could be accountable for maltreatment. The Annotated UCCMS expressly says:

> The wording for the Scope of Application (see s. 4) and for Prohibited Behaviours (see s. 5) is specifically defined in reference to Participants and "individuals", deliberately excluding organizations. Since the UCCMS contemplates rules and violations for Participants, only individuals (and not organizations) can be subject to the UCCMS.
>
> Organizations may have obligations in relation to the UCCMS including, for example, the requirement to ensure all of their policies and procedures are interpreted and applied in a manner consistent with the UCCMS. As such, organizations could face consequences for failing to respect these obligations. However, this enforcement process is distinct from the application of the UCCMS to Participants.[439]

This annotation reflects an understanding of maltreatment as happening between individual people wholly separate and apart from the activity of the sport organizations in which the harm occurs. The sport organization is not involved in these processes in a way

[438]Harbin & Llewellyn, *infra* note 456 at 142-3.

[439] Office of the Sport Integrity Commissioner*, The Annotated UCCMS*, Montreal, OSIC, 2023 [accessible here: https://sportintegritycommissioner.ca/files/Annotated-UCCMS-EN.pdf] at s 4.1. It is important to note that the obligations of the sport organizations mentioned in the annotation for s 4.1, if they exist, refer to contractual obligations of the sport organization to the SDRCC pursuant to the Signatory Agreement. This structure of obligations further distances the sport organization from the alleged abuse and those involved. At the same time, it complicates any avenue for sport participants to demand a sport organization fulfill those obligations – if we follow the standard principles of privity of contract. Under this framework, only the SDRCC can hold the sport organizations to account for breaching its signatory agreement.

which considers responsibility of the organization to its members in terms of their safety from abuse.[440] This process situates the blame for the harm squarely on the shoulders of individuals and removes the sport organization from questions of institutional responsibility in terms of contributing to what went wrong *and* in terms of ensuring things go better in the future. It, therefore, insists on this idea that maltreatment is exclusively something individuals do and that their autonomous behaviour is the focus of the analysis to establish liability or guilt.

Part and parcel with it is individualistic focus is that this model is adversarial and bipartisan. In the OSIC model, a complainant initiates a process which is about determining whether the respondent did what the complainant alleges and whether that behaviour meets a standardized definition, i.e. breaches the UCCMS. This creates two parallel truths: one alleged by the complainant and another which, presumably, exculpates the respondent or, at least, mitigates their culpability. Llewellyn warns that:

> …the bipartisan character of the [civil litigation] system carves up disputes into two sides. The system then requires that parties fall neatly onto one side or the other: plaintiff or defendant - victim or wrongdoer. As a result, it does not account for the complex relationships between and among the multiple parties involved.[441]

It becomes a contest wherein justice and truth become synonymous with 'winning'.[442] Two of Stephanie Dixon's athlete-collaborators report that the investigation process,

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[440] Sport organizations can apply to observe proceedings (*Canadian Sport Dispute Resolution Code*, *supra* note 303 at s 2.4), but the option to observe a proceeding is very different from participating in the proceeding. Moreover, permission to apply to observe a proceeding does not imply that the sport organization could have a role to play. It merely suggests that the sport organization is interested in the outcome and may be impacted by it. The *Canadian Sport Dispute Resolution Code* also contemplates intervenors, but as Llewellyn points out "interveners generally intervene on one side of the dispute or the other; they are not generally permitted to represent a third position or to act as a wholly separate party" (Llewellyn, "Legacy", *supra* note 8 at 268 nt. 55). This means that even as an intervenor the sport organization is not present to address its own systemic accountability but to pick a side based on risk assessment calculation.

[441] Llewellyn, "Legacy", *supra* note 8 at 270.

[442] *Ibid* at 272: "The logic of the current tort law system thus focuses the parties' attention on winning rather than on ascertaining what happened and what ought to be done about it."

subsequent mediation sessions, and panels clearly pitted the athletes against the respondent-coaches.[443] One of the athlete-collaborators described it as: "It was just me versus [the coach]". As a result of this bipartisanism and locked-in positioning focused on corelating behaviour with a fixed definition, complainants do not get the opportunity to tell their stories.[444] The process prescribes in advance who the characters are and what the issues are that can be discussed. Complainants in this process are not allowed or encouraged to explain what matters to them but required to prove that the respondent breached a code of conduct. This resonates deeply with Llewellyn's warning that ADR's focus on settlement fails to acknowledge the needs of the parities and assumes that settlement is the only possible outcome without thinking more broadly about justice outcomes.[445]

These processes are also adversarial which is deeply related to and reinforced by the bipartisan structure. "Adversarial", in this context, refers to the quality of the Anglo-Canadian legal system wherein, typically, two parties present evidence and argument to a third, ostensibly neutral, arbiter who determines the "truth" and issues an outcome.[446] Llewellyn tells us that the adversarial nature of civil litigation and ADR excessively narrows the idea of harm to simply the injury experienced by the complainant at the hands of the respondent.[447] Moreover, the focus on determining whether the alleged behaviour fits a definition diminishes the true breadth of the experience of the complainant and reduces their harm to a narrow violation. It "focuses the parties'

[443] Dixon, *supra* note 423 at 111 and 128.
[444] *Ibid* at 114; See also Llewellyn, "Legacy", *supra* note 8 at 270.
[445] Llewellyn, "Legacy", *supra* note 8 at 279-283.
[446] See Stephen G Coughlan, "The Adversary System: Rhetoric or Reality" (1993) 8:2 CJLS 139: Coughlan refers to several connotative and rhetorical differences within the idea of an adversarial legal system. I am referring here to what he calls the technical definition (140).
[447] Llewellyn, "Legacy", *supra* note 8 at 271.

attention on winning [proving or disproving the violation] rather than on ascertaining what happened and what ought to be done about it".[448] This relates to the insistence on corrective justice which focuses on the isolated injury experienced by the complainant.[449] Taken together these aspects of the adversarial process in the OSIC process intensify or reinforce the bipartisan nature of the process and can stiffen positions or worsen already tattering relationships.[450]

The investigative process experienced by Dixon's athlete-collaborators provides evidence of this bipartisan and adversarial structure. Several of the athlete-collaborators found the investigation to be confusing and not, ultimately, about what happened to them. It was framed around determining if the behaviours of the respondents met the standard in the UCCMS.[451] In some cases, the investigators explicitly created opportunities for the complainant to respond directly to *evidence* provided by the respondent. In one such case, the respondent had sent the investigator images from the complainant's social media in an apparent attempt to discredit her.[452] This situation displays that the parties are not incentivised to determine what happened but to win which, here, means trying to undermine the complainant's credibility by attacking her character. Another of Dixon's athlete-collaborators describes appearing before a discipline panel where she felt she "was unable to be successful at saying the things that [she] thought probably would have been important to say".[453] The idea that providing an impact statement to a disciplinary

[448] Llewellyn, "Legacy", *supra* note 8 at 272.
[449] *Ibid* at 274.
[450] Llewellyn, "Legacy", *supra* note 8 at 272.
[451] Dixon, *supra* note 423 at 112.
[452] *Ibid* at 124 and 126.
[453] *Ibid* at 128.

panel could provoke feelings of success or failure, again, militates toward the adversarial focus on winning not discovering what happened or the needs of those involved.

Individual responsibility for maltreatment is the looming issue within the OSIC Complaint Management Process. The Process and the UCCMS reduce the actions of people, so that they can be compared against a code of conduct and assessed for punishment. It also narrows the harm people experience to an individualized and discrete harm which is cut off from anyone else's experience. It insists that we are only individuals and very little holds us together when it comes to resolving or healing after someone causes us harm. The OSIC, furthermore, prevents any kind of broader understanding of organizational accountability or contextualization of behaviour. The OSIC model only allows for individuals to be responsible for the harm. It is organized around holding decontextualized *individuals* accountable.

Again, one of Dixon's athlete-collaborators provides evidence for this reality. She reflected on how the sport organization problematized her disability even before any formal complaint was filed and entrenched itself in that position. After the athlete made it clear to the sport organization that she was having trouble with her coach's abelistic attitude, the organization responded by suggesting that her values did not align with those of Team Canada and that she was "uncoachable".[454] Dixon, rightly, observes that this was "an attempt to absolve [itself] of [its] responsibility to provide [the athlete] a safe sport environment" by making the athlete and their body the problem.[455]

Restorative justice understood relationally offers a way of distributing the project of justice by "operationalizing the role of community" and paying attention to the

[454] Dixon, *supra* note 423 at 75
[455] *Ibid*.

responsibility of the community for injustice while also insisting on the community's involvement in the solution and movement forward.[456] Our current response to maltreatment clearly understands justice as something done *by* the sport system *to* individual bad acts, ostensibly, on behalf of a victim. The current system pays lip service to the relational reality of harm and justice, but it is ultimately organized around transactional and individualistic notions of justice wherein the community (read: sport organization) does not have a role in justice moving forward.

5.3 Sanction Focused

In ways the further obscure the root causes of maltreatment and further entrench the overall focus on individuals and the behaviour, the OSIC Complaint Management Process is deeply punitive and organized around sanctioning people. This "preference for removing individuals who have harmed others as though excising an invasive cancer from the body politic" is further evidence of Coker's Crime Logic.[457] In the criminal law this impulse manifests as putting people in jail. In the sport context, the Director of Sanction and Outcomes can impose, among other sanctions, a suspension or expulsion from sport. What's more revealing, however, is not the kind of available punishments but the structural preference to punish and impose sanctions as a way forward after harm. When we dig deeper into this system, we see that the jurisdiction of the OSIC Complaint Management Process is purposively constructed to impose sanctions on individuals.

The sanctioning authority of the OSIC and Abuse-Free Sport derive from its foundation in contract law as discussed in chapter 3. Access to the OSIC Complaint

[456] Ami Harbin & Jennifer J Llewellyn, "Restorative Justice in Transitions: The Problem of 'the Community' and Collective Responsibility", in Kerry Clamp ed, *Restorative Justice in Transitional Settings* (London: Routledge, 2016) at 134.
[457] Coker, *supra* note 8 at 156 (Citations removed).

Management Process revolves around a contract between a sport organization or "Signatory" and the SDRCC.[458] Part of the contract requires the Signatory to obtain explicit consent from each of its members and participants, so that they agree to be subject to the UCCMS by signing the UCCMS Informed Consent Form.[459] This consent form is the key to the OSIC's authority to enforce the UCCMS. It implies that maltreatment is *not* about the relationships between individual sport participants but about the contractual obligations the individuals owe to the SDRCC. It suggests, in other words, that a breach of the UCCMS is a violation of a contract. The person harmed by the violation is not privy to that contract. They are a witness to the violation but, in legal terms, not the injured party.[460]

This structure is functionally about processing complaints *away* from the sport organization and creating access to sanction people who breach the UCCMS. The definition of "Reporting" in the UCCMS does not limit reports to people within a contractual relationship with the SDRCC[461], however only Participants can violate the UCCMS because only they are subject to the contract enforcing it.[462] This creates a venue

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[458] Of the entire Abuse-Free Sport program only the SDRCC is a legal entity with the capacity to contract.
[459] *Program Signatories*, https://sportintegritycommissioner.ca/signatories, *supra* note 312. See also *Executive Summary of the Signatory Agreement*, *supra* note 312 at 1; and *Summary of the UCCMS Informed Consent Form*, *supra* note 312.
[460] This structure is re-iterated in that complaints are referred to the system, and, then, the system investigates and *prosecutes*, so to speak, the complaint. In other words, it is not unlike the criminal justice system in Canada wherein the victim of a crime is a witness while the state investigates and prosecutes.
[461] UCCMS, *supra* note 24 at Appendix I, s q: "Reporting (or Report) « Signalement (signaler) »: The provision of information by a Participant or by any person to an independent authority designated by the Adopting Organization to receive Reports regarding Prohibited Behaviour. Reporting may occur through either: (i) the person who experienced the Prohibited Behaviour, or (ii) someone who witnessed the Prohibited Behaviour or otherwise knows or reasonably believes that Prohibited Behaviour or a risk of Prohibited Behaviour exists."
[462] UCCMS, *supra* note 24 at Appendix I, s l: "Participant « Participant »: Any individual who is subject to the UCCMS. Participants could include, without limitation, athletes, coaches, officials, volunteers, administrators, directors, employees, trainers, parents/guardians, etc., according to the policies of the Adopting Organization." See also: *Executive Summary of the Signatory Agreement*, *supra* note 312 at 2 which lists the obligations of a Signatory including: "Obtaining the consent of persons affiliated with the

for receiving complaints *from anyone* but only processing those *for which a sanction can be imposed.* It thereby further limits what we pay attention to and what we can learn which also further obscures a view of the system itself. The value of this system is its capacity to impose sanctions. Ultimately, without the jurisdiction to inflict a punishment the OSIC and the SDRCC have no relevance to the maltreatment done or harm experienced. This all underlines the point of the following paraphrasing of a passage by Llewellyn and Harbin: "Punishment [serves] the interests of the [sport system] as a show of power and authority, while doing nothing to address the harms caused by the wrongdoing. [Maltreatment is] about law-breaking [or breaching a contract], not harm."[463]

Within the sanctioning process itself we see a reflection of what Coker calls "a disdain for policy attention to social determinants of behavior."[464] In the "Sanctioning Considerations" in the UCCMS there is no substantial reflection on the possibility that a person's social position *even within sport* could have influenced their decision.[465] For example, hazing would meet the definition of maltreatment, but research tells us that hazing is rarely, if ever, the act of an individual. In fact, the idea of hazing does not make sense without the larger context of ritualized initiation into a closed community or group.[466] To suggest that the responsibility for hazing falls on the shoulders of a single

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Program Signatory ("UCCMS Participants") so that all UCCMS Participants become subject to the UCCMS and its administration and enforcement processes".

[463]Harbin & Llewellyn, *supra* note 456 at 138. The original passage is: "Punishment served the interests of the state as a show of power and authority, while doing nothing to address the harms caused by the wrongdoing. Crime was about law-breaking, not harm."

[464] Coker, *supra* note 8 at 156. Citations removed.

[465] UCCMS, *supra* note 24 at s 7.4.

[466] See Judy L Van *et al,* "The Relationship between Hazing and Team Cohesion" (2007) 30:4 Journal of Sport Behavior; Sandra L Kirby and Glen Wintrup, "Running the Gauntlet: An Examination of Initiation/Hazing and Sexual Abuse in Sport" (2002) 8:2 Journal of Sexual Aggression 49; Paul Dennis, "Harassment in Sport: Implications for Coaches Regarding Sexual Abuse and Ritual Hazing" (1998) 64:2 Journal of Canadian Association for Health, Physical Education, Recreation and Dance.

individual is incoherent and to suggest that several individuals could bear responsibility separately is similarly illogical. Rather than demonstrate some awareness of the nature of hazing, for example, the Sanctioning Considerations contain mostly aggravating circumstances, which is to say they make it easier to impose a more severe punishment on an individual.[467]

Once someone is sanctioned – even if the sanctions are provisional – their name will most likely appear in the Abuse Free Sport Registry.[468] This mechanism mimics the sex offender registry[469] with some crucial differences, namely: the Abuse Free Sport Registry is open to the public; it contains provisionally sanctioned people as well as sanctioned individuals; and it relates to more than just sexualized harm.[470] Creating a list of sanctioned individuals emphasizes the notion that it was these specific people who committed maltreatment. It names them publicly so as to denounce and separate them from sport. In general, it plays into the common criminal law trope that people who do maltreatment are "unredeemable deviants who must be tracked and registered".[471] To return to an earlier concept, we can reflect on how *rational* it might *feel* to create a countable list of delivered sanctions. There is a sense in which this registry and the fact

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[467] UCCMS, *supra* note 24 at s 7.4: Of the 15 considerations 2 are potentially mitigating of punishment and only s 7.4(k) seems to suggest that a respondent's behaviour has any relationship to the social structures in which they find themselves. The concluding paragraph of the section emphasizes that the main purpose of the considerations is to increase the sanction and not to mitigate it:

> Any single factor, if severe enough, may be sufficient to justify the sanction(s) imposed. A combination of several factors may justify elevated or combined sanctions.

[468] UCCMS, *supra* note 24 at s 8.1; See also: Abuse Free Sport, *Abuse Free Sport Registry*, Montreal, Abuse-Free Sport, n.d. [accessible here: https://sportintegritycommissioner.ca/registry].

[469] See Royal Canadian Mounted Police, *Sex Offender Management*, Ottawa, RCMP, 2023 [accessible here: https://www.rcmp-grc.gc.ca/en/sex-offender-management].

[470] *Ibid*.

[471] Coker, *supra* note 8 at 155.

that it is open for all to see is part of the impulse toward producing results and demonstrating effectiveness which is inherent to the rationalization of sport.

There is a deep irony to the structure of sanctioning enforcement. The supposed benefit of the OSIC is that it relieves the sport organizations from the burden of the complaint management process and creates some independence for decision making, but the agreement between the Signatory and the SDRCC as well as the consent form signed by the Participant do not contain a mechanism by which the OSIC or Abuse-Free Sport enforces the sanctions the Director of Sanctions and Outcomes imposes.[472] Thus, although the Abuse-Free Sport program creates the opportunity for independent investigations and sanctioning, it does not assist in the enforcement of those sanctions or investigations.

The lack of substantive sanction enforcement implies a fallacy about responding to harm and misconduct, namely: enforcing a sanction or punishment requires fewer resources than the complaint management, investigation, and administration process. It is easy, however, to imagine a scenario in which the DSO may require the coach to undergo some sort of education in order to re-integrate. It then presumably falls to the sport organization to confirm that education happened or administer it which is not an insignificant task. My point here is that it is not truly possible for the sport organization in which the maltreatment occurred to escape reckoning with that maltreatment – no matter how many layers of independence Abuse-Free Sport creates. A system constructed

[472] *Executive Summary of the Signatory Agreement*, *supra* note 312; *Summary of the UCCMS Informed Consent Form*, *supra* note 312. I also had access to an early draft of the Master Service Agreement between the SDRCC and a national sport organization. It contained no references to enforcement of the sanctions except an obligation on the part of the sport organization to comply with the sanction determined by the Director of Sanctions and Outcomes.

around Crime Logic fails to grasp this fundamental relational insight and thereby fails to respond to harm in a way that attends to the context of the harm or the other people less directly impacted.[473]

Responding to maltreatment exclusively with punishments and sanctions just delays and avoids the deeper work of justice and ignores an opportunity to directly learn *why* the decision which caused harm was made at all. Corrective and punitive justice focuses on looking backward and narrowly defines justice as something done rather than some we keep doing.[474] Restorative justice asks why the decision which caused harm was made at all and how do we prevent it from being made again.[475] We can easily imagine well-intending coaches imbued with power, embedded in a culture geared toward high performance at all costs, and whose livelihood and reputation are tied to the performance of their athletes slip into coaching practices which are harmful to athletes.[476] Similarly in the case of hazing, athletes determined to create a sense of team cohesion and emboldened by a sense of tradition will resort to strategies for building that cohesion that are dangerous and risk the welfare of their teammates without having their desired effect.[477] In both of these cases individuals make choices which can harm others, but in neither case could it be said the person causing harm was abnormal or monstrous.[478]

In order to respond to these scenarios restoratively, our focus is not on blaming these individuals but understanding the decisions they made and using that understanding to prevent those being permissible ways of building or maintaining relationships in the

[473] Coker, *supra* note 8 at 185-187; Cf. Llewellyn, "Legacy", *supra* note 8 at 287-288.
[474] Llewellyn, "Legacy", *supra* note 8 at 291.
[475] Llewellyn *et al*, "Dalhousie Dentistry", *supra* note 343 at 46.
[476] Gervis & Dunn, *supra* note 11.
[477] Van *et al*., *supra* note 466.
[478] Llewellyn *et al*, "Dalhousie Dentistry", *supra* note 343 at 46.

future.[479] People who caused harm ought to be part of that learning and process for improving the way forward -- not in a way that makes an example of them or tries to teach them a lesson. As Llewellyn and Harbin write:

> [I]ndividual responsibility should not replace or foreclose collective responsibility, but should demand explicit examination of the structural and systemic injustices to identify the connection to collective responsibility.[480]

Responding to the relationality of maltreatment properly, in other words, does not just call out people who have caused harm but include them as part of the collective pursuit for just relations. It allows for a broader and more nuanced understanding of causation, so that a fuller understanding of what happened and how to respond can emerge. It requires recognizing that harm occurs in a context, and changing that context is a necessary step toward creating the conditions for just relations and preventing further maltreatment.

At first blush, mediated settlements might seem to offer a creative pathway of allocating accountability, but punishment always looms for respondents. Although breaching a settlement could result in further mediation by agreement, the reality is that a breach of a settlement agreement actually constitutes a reportable complaint.[481] Furthermore, the settlements themselves must be reviewed by the DSO.[482] That is to say that the office charged with meting out sanctions also supervises mediation to, in part, ensure that the settlements do not bring Abuse-Free Sport into disrepute.[483] This

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[479] Llewellyn *et al*, "Dalhousie Dentistry", *supra* note 343 at 47.
[480] Harbin and Llewellyn, *supra* note 456 at 148.
[481] See Dixon, *supra* note 423 at 112 for an example of a process conflating these ideals wherein the outcome of a mediation process was that the victims of abuse would be allowed to determine the punishment of the respondent-coach. Cf. Abuse-Free Sport, *Review of Mediated Settlements Policy*, Montreal, Abuse-Free Sport, 2023 [accessible here: https://abuse-free-sport.ca/files/Abuse-Free_Sport_-_Review_of_Mediated_Settlements_Policy_Final_-_EN.pdf] at s.6.
[482] *Ibid* at s.1; Cf. Abuse-Free Sport, *Process Overview*, Montreal, Abuse-Free Sport, 2022 [accessible here: https://sportintegritycommissioner.ca/process/overview].
[483] Abuse-Free Sport, *Review of Mediated Settlements Policy*, Montreal, Abuse-Free Sport, 2023 [accessible here: https://abuse-free-sport.ca/files/Abuse-Free_Sport_-

additional jurisdiction over settlement agreements by the DSO further conflates the activity of punishment with the activity of mediated resolution and reinforces the focus on sanctioning and punishment. Even if the DSO's review is ostensibly about protecting people in an inferior bargaining position, it would have the added effect of allowing the DSO to enforce a specific version or narrative of justice – even if the parties had imagined something different.

There is an overarching critique revealed in the concatenation of all these issues identified above, i.e. by explicitly opposing a complainant and respondent the process suggests that the dispute is about justice as between these two parties. It creates the illusion of an opportunity for corrective justice which, according to Llewellyn, "seeks to remedy the harm - to address the inequalities created by the interference with the victim's rights - through the notion of a material transfer from wrongdoer to victim".[484] I am not suggesting that the OSIC process implies complainants could be compensated, but I would argue that the structure could lead some to believe that by making a complaint the harm they experienced will be vindicated and remedied.[485] Instead, the outcomes are limited to a set of punitive sanctions which are about the behavior of the respondent and not about providing any remediation for the harm they caused.[486] This structure, therefore, trades on expectation of material remediation from the civil legal system and

_Review_of_Mediated_Settlements_Policy_Final_-_EN.pdf] at s.4(c). There are other principles involved in the DSO's analysis which are more about the safety and validity of the settlement agreement. It is telling, however, that the obligation born by the DSO to review these agreements derives, at least in part, from protecting the system itself. Arguably, this is not a conflict of interest on its face, but certainly there may come a time when Abuse-Free Sport's interests are not perfectly aligned with the interests of parties to the agreement.

[484] Llewellyn, "Legacy", *supra* note 8 at 275.

[485] Dixon, *supra* note 423 at 78, 80, 84-5, and 128 (where one athlete-collaborator asks for remuneration for therapy as a sanction which the OSIC process is not empowered to grant).

[486] I recognize that the UCCMS allows for more creative or nuanced punishments, but they are only permissive of such sanctions and are certainly not structured around finding solace for the complainant.

substitutes it with the logic of the criminal legal system which metes out punishments for wrongdoing. In short: where complainants are expecting a response to their experiences and needs, they are met with their trauma being exchanged for the punishment of the respondent -- without any explanation for what justifies that exchange or the process that led to it.

Dixon provides a primary example of this inadequate exchange. One athlete-collaborator's abuse was determined to be so minor that the abusive coach was not punished.[487] In other words, even though the abuse was confirmed, the harm she experienced was not valuable enough to warrant a punishment for her abuser. For another athlete-collaborator a denied punishment was equivalent to denied justice.[488] In a final example, an athlete-collaborator expresses her the repugnance of being asked to determine the punishment for the abusive coach during mediation – as if it would make the exchange more equitable if she and other victims got to pick his punishment.[489]

Implicitly, the OSIC Complaint Management Process functions on the idea that it could sanction away all the abusive people in the sport system. This repeats the overarching trope that the problem of maltreatment in sport is a problem of "bad actors" and not a problem of the culture of sport itself.[490] This reliance on sanctioning also creates an enhanced need for procedural rights and procedural fairness to ensure due process and appeal proof sanctions.[491] A pathway for responding to maltreatment which

[487] Dixon, *supra* note 423 at 97.
[488] *Ibid* at 127.
[489] *Ibid* at 112.
[490] Roberts *et al*., *supra* note 418; Nite & Nauright, *supra* note 418; Hartill, *supra* note 10.
[491] It is also true that by attempting to blame and punish an individual for a systemic issue, the system itself risks placing too much blame at the feet of one person which exacerbates the need for procedural fairness. In other words, the individual focus in light of the systemic and relational nature of maltreatment feeds the need for procedural rights which, in turn, entrench the individualistic nature of the system. This reality

did not so aggressively or eagerly rely on punishment would not require the same kind of procedural mechanisms. That is not to say it would be unfair but the kinds of procedural and systemic harms from which procedural rights protect respondents would not loom quite so large in a system focused on, for example, collaborative, educative, and re-integrative strategies for responding to maltreatment – where appropriate. This more relational and restorative approach would not require the same kind of protections for participants because those participants are not at risk. Llewellyn *et al* remind us that a restorative process does not trade on the idea of fairness simply for the sake of compliance with specific procedural requirements.[492] Instead, the principles of restorative justice grounded in relational theory ensure substantive and meaningful engagement with the people affected by the harm – both directly and indirectly.[493]

Ultimately, this complaint management process is about sanctioning individuals whose behaviour meets a specific definition and violates the agreement between the member and the SDRCC.[494] The preventative intent of the UCCMS and the OSIC does not look forward and educate people to do better but looks backward at instances of a prohibited behaviour and excises people who breach the Code so they cannot do it again.[495] This framework does not prevent maltreatment; it reacts to it. The only preventative *mechanism* within the UCCMS is its capacity to deter which is based on mostly outdated criminological assumptions about controlling behaviour.[496]

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becomes even clearer when we understand justice relationally rather than in terms of individual blameworthiness and transactional exchanges.

[492] Llewellyn *et al*., "Imagining Success", *supra* note 375 at 303.

[493] *Ibid*.

[494] *Summary of the UCCMS Informed Consent Form*, *supra* note 312.

[495] See UCCMS, *supra* note 24, at s 7.2 for a list of sanctions.

[496] Cf. UCCMS, *supra* note 24, at s 7.4(i). For an extended discussion of deterrence theory and the debate around its validity, see Travis C Pratt, Francis T. Cullen, Kristie R. Blevins, Leah E Daigle, and Tamara D

5.4 Transactional not Transformative

The key obstacle for the OSIC model is that it is not organized in a way which creates opportunities to learn and move forward. The problem is that the UCCMS and the OSIC's Complaint Management Process are beholden to Crime Logic and principles derived from the civil legal system. They trade on transactional understandings of justice and over-simplified understandings of harm, while empirical evidence tells us that maltreatment is a complex and dense social phenomenon that requires comprehensive and capacious reflection to fully understand.

This critique raises similar issues to those raised by Llewellyn, Sinclair, and Hashey in their review of the Northwest Territories Human Rights Regime. They argue that human rights regimes developed out of an "understanding of human rights as a matter of public interest that could not be served by processes oriented to private dispute resolution or ascription of individual culpability.[497] Human rights commissions were originally meant to respond to discrimination in educative ways and to focus on prevention more than punishment,[498] but it turns out that several decades of reviews of Canada's human rights commissions yield the prevailing pronouncement that they are too

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Madensen, "The Empirical Status of Deterrence-Theory: A Meta-Analysis" in Francis T Cullen, John Paul Wright, & Kristie R Blevins eds, *Taking Stock: The Status of Criminological Theory* (New Brunswick, NJ: Transaction Publishers, 2006).

[497] Jennifer J Llewellyn, Murray Sinclair, and Gerald Hashey, *Northwest Territories Human Rights Act Comprehensive Review: A review and analysis of human rights promotion and protection in the Northwest Territories* (Yellowknife: Northwest Territories Assembly, 2015) [Llewellyn *et al*., *NWT Review*] at 12 citing *MacKeigan v. Hickman*, (1989] 2 SCR 796, 61 DLR (4th) 688; *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36, [2003] 1 SCR 884; Canadian Human Rights Act Review Panel *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000); and Walter Surma Tarnopolsky, "The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada" (1968), 46 Can Bar Rev 565; *Seneca College v Bhadauria*, [1981] 2 SCR 181, 124 DLR (3d) 193.

[498] Dominique Clement, "Renewing Human Rights Law in Canada" (2017) 54:3 Osgoode Hall LJ 1311 at 1333; Dominique Clement, *Human Rights in Canada: A History* (Waterloo, ON: Wilfrid Laurier University Press, 2016).

focused on individual complaints and not enough on education as a means to prevention.[499]

A close reading of Article 1.2 of the UCCMS suggests that it is not *fundamentally* about resolving individual disputes or punishing people but has a public interest purpose:

> Individuals should have the reasonable expectation when they participate in sport in Canada that it will be in an environment that is free from all forms of Maltreatment and that treats every individual with dignity and respect. Maltreatment in all its forms is a serious issue that undermines the health, well-being, performance and security of individuals, communities, and society.[500]

The UCCMS, here, invokes the ideas of environment, community, and society and insists that these spaces, which are created in and through our connectedness and our relationships, ought to be respectful, safe, healthy, and productive of individual dignity, wellbeing, performance, and security. Although we could argue that this ideal safe culture might be grounded in a system of dispute resolution, relational theory tells us that such an individual focus would not yield broad systemic results. This purpose implies that the sight of the UCCMS' work *should be* the conditions created by the way we come together – by the way we create our sport environment, our communities, and society.

This is a public interest purpose insofar as it is about creating an environment for all Canadians where they can participate in sport safely. It resonates with the section 2 of the *Canadian Human Rights Act*:

> …all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices…[501]

The UCCMS is also similar to the Nova Scotia *Human Rights Act*:

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[499] Clement, *supra* note 498 at 1331-2 and 1340; Cf. Tarnopolsky, *supra* note 498; Karen Schucher, "Pathways to "the Iron Hand in the Velvet Glove": Historical Underpinnings of the Ontario Human Rights Commission as Law Enforcer" (2014) 18:1 CLELJ 71.
[500] UCCMS, *supra* note 24 at s 1.2.
[501] *Canadian Human Rights Act*, RSC 1985, c H-6, s 2.

> …the government, all public agencies and all persons in the Province have the responsibility to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and productive life and that failure to provide equality of opportunity threatens the status of all persons…[502]

Like the UCCMS, these sections from human rights legislation are not about resolving specific harm or deterring specific behaviours but about creating the conditions for people to live together.

The OSIC's punitive individualized complaint process, however, cannot fulfill a public interest purpose because attending to a purpose which is about supporting a specific kind of environment requires taking seriously the connective tissue of human environments, i.e. our relationships with one another.[503] We see some evidence of this in Dixon's research. One of her athlete-collaborators recounts her experience of dealing with both systemic discrimination and instances of directed personal discrimination.[504] Dixon identifies that the athlete-collaborator is constantly balancing trying to change the system while finding some personal justice for the harm she experienced.[505] The sport organization, the mediator, and investigators involved in this complaint each attempted to reduce the complexity of her experience to her individual body and her disability. There was no understanding that what this athlete experienced was an extension of a larger cultural and systemic reality that normalized discriminatory structural obstacles *as well as allowed for instances of directed personal discrimination*.

This athlete goes on to say that she believes now she should have asked for an "environmental assessment" rather than lodged a complaint.[506] She is referring to an

[502] *Human Rights Act,* RSNS 1989, c 214, s 2(e).
[503] Llewellyn *et al*., *supra* note 497 at 13.
[504] Dixon, *supra* note 423 at 70-85.
[505] *Ibid* at 73, 75.
[506] *Ibid* at 149.

offering at the OSIC called Sport Environment Assessments or "SEAs" which "intend to address alleged systemic issues related to the [UCCMS] to improve the sport environment for both current and future participants in a manner consistent with the OSIC mandate and the applicable OSIC policies & procedures".[507] The OSIC cannot require sport organizations to follow recommendations stemming from a SEA. Rather it

> uses a public reporting mechanism that includes a number of follow-ups and the publication of an implementation report one year later. This follow-up process and implementation report provides a means for others, including funding partners, to hold the organization accountable in terms of its actual implementation of the Assessment recommendations.[508]

As of writing, there is only one[509] completed public reports of a SEA which does some systemic analysis and offers recommendations for improving the culture of a sport, but it is limited in scope to issues of anti-black discrimination and racism. This curtails its capacity to analyze the totality of the culture of the sport or take any kind of intersectional approach to its analysis. It also, inevitably, leans into the mechanisms and pathways available within the OSIC rather than seek to find less adversarial and individualistic solutions for situations involving systemic discrimination or racism.

We ought to note that, although these assessments operate at a more systemic level, they are still required to send any discovered maltreatment to the complaint system. And, it is also true that the UCCMS' definition does not lend itself to a systemic analysis, so although the assessment might take a wider perspective it is difficult to imagine how the UCCMS' definitions assist in locating the systematicity of maltreatment. Finally, it is not

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[507] Abuse-Free Sport, *Sport Environment Assessment*, Montreal, Abuse-Free Sport, 2022 [accessible here: https://sportintegritycommissioner.ca/sport-environment-assessment}.
[508] Abuse-Free Sport, *Sport Environment Assessment FAQ*, Montreal, Abuse-Free Sport, 2022 [accessible here: https://sportintegritycommissioner.ca/sea-faq].
[509] Grace Vaccarelli, *Ontario Volleyball Association: Sport Environment Assessment*, Montreal, OSIC, 2024 [accessible here: https://sportintegritycommissioner.ca/files/2024-06-06_OSIC_Sport_Environment_Assessment_Report%E2%80%93Ontario_Volleyball_Association.pdf].

clear that if Dixon's athlete-collaborator had sought a SEA she would have secured the justice she was looking for. Part of the early analysis before a SEA begins is determining if the better forum is the complaint management process and if that would create a duplicated process.[510] It is possible, in other words, that she could have ended up in a complaint process anyway. This procedural reality points to a continued bifurcation of the systemic from the personal in a way which insists on personal harms deserving one kind of justice and systemic harm requiring something else. There is no recognition of the reality that these personal harms must be part of the analysis of the systemic issues and *vice versa*.

Critically here we must note that despite the fact that the UCCMS contains this public interest purpose and despite the fact that we know such purposes are not served through punitive and individualistic mechanisms, the sport system *still* developed a process which reflects these characteristics of the current legal system. The same characteristics which relational theory of justice tell us preclude the OSIC Complaint Management model from transformative work at the level of culture.

A relational theory of justice tells us that if we want to change the nature of a culture then we have to include the culture and community in our justice processes.[511] Justice cannot be exclusively about what happens in the breach of a code of conduct but must include how we shape our relationships on the everyday.[512] Llewellyn writes:

> it is in addressing such injustices restoratively – with a view to the needs and interests of those affected, calling on those with responsibilities to address the harms and support a just way forward and to establish

[510] Abuse-Free Sport, *OSIC Guidelines Regarding Sport Environment Assessments,* Montreal, Abuse-Free Sport, 2022 [accessible here: https://sportintegritycommissioner.ca/files/OSIC_Guidelines_Regarding_Sport_Environment_Assessment_updated_version_July_2023_final_draft_EN.pdf?_t=1691693286] art. 5(c).
[511] Harbin and Llewellyn, *supra* note 456.
[512] Llewellyn, "Expanding our Taste", *supra* note 373 at 476.

> conditions, commitments and plans to do the work required for justice to prevail in the future – that restorative justice has revealed the proactive and preventative requirements of justice.[513]

Responding restoratively to maltreatment is not about a new set of techniques or a special set of clauses for policies. Rather it is a shift in approach – a new way of thinking about and understanding society as well as the shape and place of justice systems within society. In the next chapter, I will show the difference feminist relational theory and restorative justice make to how we respond to maltreatment in sport.

[513] Llewellyn, "Expanding our Taste", *supra* note 373 at 477.

CHAPTER 6: CONCLUSION

A relational theory of justice does not see justice as the static result of a rigid equation but as an ongoing process of construction embedded in and created by a complex web of nested relationships between and among people and the institutions and organizations they make up. It does not simply react to individual moments of harm but addresses the root causes of that harm in its context. This requires attention beyond the individual to what is connected and collective. This is the transformative work a restorative approach to sport will do. Crucially, any restorative response strategy to maltreatment must not exclusively react to moments of harm but must respond to those discrete moments in a way which simultaneously responds to, and is constitutive of, the whole problem of maltreatment. Restorative justice would disrupt the established delinking of responding to harm from the proactive work to prevent harm which has marked sport since at least 1994.[514]

Notwithstanding the constant calls for punitive quick fixes for justice in sport, a restorative approach will not be accomplished simply by a cadre of experts delivering a commodified-justice product to the sport community. Rather restorative justice, if it is to be thoroughly relational and, thereby, transformative must be the work of those participating in sport as a community not just when things go wrong but also in order to actively constitute those conditions necessary for things going well on the every-day.

As I discussed in the previous chapter, Jennifer Llewellyn provides a set of principles for "doing and assessing the work of justice" both in "substance and process".[515] The principles are:

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[514] 1994 is the year that Corbett's *Harassment in Sport: A Guide to Policies, Procedures and Resources* was published (*supra* note 7).
[515] Llewellyn, "Responding", 8 at 129-130.

- Relationally focused: resist isolated view of individuals or issues;
- Comprehensive/holistic: take account of contexts, causes, and circumstances and are oriented to understanding what happened in terms of what matters for parties;
- Inclusive/participatory: relational view of parties with a stake in outcome of the situation—those affected, responsible, and who can affect outcome, communicative, dialogical processes that support agency and empowerment;
- Responsive: contextual, flexible practice attentive to needs of parties;
- Focused on taking of responsibility (individual and collective) not on blame;
- Collaborative/non-adversarial;
- Forward-focused: educative, problem solving/preventative and proactive.[516]

For Llewellyn, these principles guide the work of restorative justice and ensure that it is relational. Another way to understand the import of these principles is to see them as guiding our actions, analysis, decisions, and intuitions so that they are reflective of our relational ontology. These principles in other words shape what we do to be more in line with a posture of outward concern described by Whitbeck above.[517]

6.1 Implications of a Restorative Approach for Sport

In this conclusion I drill down into the difference these principles make in how we respond to maltreatment in sport. In other words: what would it look like to apply these principles in the sport maltreatment context? We must keep in mind that the call in the principles for comprehension, inclusion, responsiveness, and collaboration create a kind of hermeneutic horizon which resists determination in advance of what the new restorative policies and procedures will be.[518] Thus, without contextual details of the lives and needs of those involved and their meaningful participation in the design of the new procedures it will be hard to define in advance the ins-and-outs of fully-fledged

[516] Llewellyn, "Responding", at 130. See also, Llewellyn *et al*, "Imagining Success", *supra* note 375 at 300.
[517] Whitbeck, *supra* note 327.
[518] See Appendix A for an outline of a possible structure for responding to maltreatment at a provincial level. This outline was designed for a collaboration between the Restorative Lab and Sport Nova Scotia funded, in part by, Mitacs. It is the result of the thinking and work of Prof. Jennifer Llewellyn, Jacob MacIsaac, Melissa McKay, Richard Derible, Elana Liberman, and Jacob Glover.

restorative approach to sport.[519] I will, instead, focus on how certain aspects of justice-seeking strategies in sport may change based on these principles and how locating justice in this new way will necessarily shape the way sport is governed and delivered.

6.1.1 Focus of the Response

A restorative approach to maltreatment would focus on both reactive and proactive responses rather than only reacting to the past behaviour of individuals. Although there can and will be some kind of process designed to respond to an episode of harm, these processes will not be limited in their focus to whether an individual breached a code and, therefore, deserves to be punished. If justice, on this account, is about establishing the conditions for just relations, then justice requires us to respond to harm in a way that looks forward rather than backward. Furthermore, because the approach recognizes the impact of our connectedness, we know that the behaviour of individuals is contextually dependent on the network of relationships in which they find themselves. And any harm someone experiences is not experienced in an isolated vacuum but has ripples into their surrounding relationships.

This will require a transition away from the current bifurcation between proactive culture work happening separately and in isolation from the reaction to harm. We can imagine a response to episodes of harm which centers and embeds the values and ideals promoted by True Sport, for example. By centering these values into the centre as shared commitments and not simply aspirational goals, we can make greater use of them as we respond when things go wrong. In other words, rather than asking questions about blame, we could ask questions about why someone could not maintain their commitment to

[519] Llewellyn, "Legacy", *supra* note 8 at 292.

safety, or why did they think it was appropriate to neglect that commitment in a specific situation? These questions would not be condescending but part of a genuine inquiry to understand what went wrong and contributed to the harm at issue.

As we shift the way we respond to harm we will learn that prevention requires shifting other systems to be more relational. That is to say that responding to maltreatment with a proactive focus as well as a reactive focus allows us to use what we learn from the response processes to shape future action. Inevitably this will lead us to disrupt the structures and policies which are revealed to be conducive and contributing to harm. To this end, we might imagine employing responsive regulatory paradigm informed by the restorative principles rather than using contracts as the model for regulating and organizing sport. The theory of responsive regulation argues that regulation is not as narrow, in practice, as the conventional 'command and control' model[520], at the same time, regulation must embrace a different normative framework in order to function properly.[521] Responsive regulation sees regulation as an expansive exercise that prioritizes collaboration between the regulator and regulated entity or person. It avoids using sanctions as the primary strategy for compliance and, instead, aims to persuade regulated entities to comply. It is also about looking forward and improving the sector in which the regulation occurs. It is not simply a mechanism of

[520] Julia Black, "Critical Reflections on Regulation" (2002) 27 Aust J Leg Phil. at 2-3, and 11. What I am calling the traditional definition of regulation is becoming more and more a historical artefact as regulatory theory continues to evolve and take on more nuanced shapes beyond just responsive regulation. (See Peter Drahos ed, *Regulation Theory: Foundations and Applications* (Canberra: ANU Press, 2017) and Martin Cave, Robert Baldwin, & Martin Lodge eds, *The Oxford Handbook of Regulation* (Oxford: Oxford University Press, 2010)).

[521] John Braithwaite, "Relational Republican Regulation" (2013) 7 Regulation & Governance at 128; Peter Drahos and Martin Krygier, "Regulation, Institutions, and Networks" in Peter Drahos ed, *Regulation Theory*, (Canberra: ANU Press, 2017) at 3. See Marcus Mazzucco and Hilary Findlay, "Finding a Way Forward: Addressing Organizational Factors Contributing to Systemic Maltreatment in Canadian Sport" Forthcoming (Available upon request) for some early thinking on this idea.

behavioral compliance but a way of embedding norms into a specific regulated sector which are collaboratively established and then collectively perpetuated. Llewellyn tell us that a restorative approach to justice informed by relational theory enhances the responsive regulation paradigm because:

> [i]t can identify the relational conditions and circumstances that require more structured interventionist responses and then inform processes and practices to secure those conditions until such time as capacity or commitment exists to relate in just ways reflective of respect, care/concern, and dignity.[522]

Where regulating and organizing sport according to contracts and transactions reduces our relationships to the four corners of those documents, so to speak, a responsive regulatory framework would allow us to build structures and broad organizational relationships which produce the relational outcomes we think are important. It also gives us a methodology for responding when a regulated entity or person fails to measure up to the standards we set for ourselves.

Furthermore, this more restorative and relational way of working and being together would shift the way sport understands evaluation and metrics for success. We cannot use metrics from the prior system and way of working to measure the success of athletes, coaches, and sport organizations.[523] Instead, we should use the restorative principles themselves as guidelines for success. This means evaluation will not be reduced to a box-checking exercises ordained from on high.[524]

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[522] Llewellyn, "Responding", *supra* note 8 at 130.
[523] Llewellyn *et al*, "Imagining Success", *supra* note 375 at 305ff.
[524] Currently in Nova Scotia, for example, funding for sport organizations is dictated by the Sport Development Tool which assesses a given sport's eligibility based on the categories, Organizational Effectiveness, Participation, Coaching and Officiating, and Excellence (See Sport Nova Scotia. *Sport Funding Programs and Eligibility* Halifax, Sport Nova Scotia, n.d. [accessible here: https://sportnovascotia.ca/funding-programs-and-eligibility/]).

For example, funders, in collaboration with athletes, coaches, and sport organizations, could *design and agree* on a funding model which uses a holistic and solution-oriented assessment for determining funding allocation. In this way, funding would not have to be tied exclusively to incentivizing higher and higher performance but about creating the conditions for healthy relationships in the sport. A funding model re-oriented around supporting athletes, coaches, and sports in the ways they need to be support and not simply in reaction to past success will decrease the competitive pressure between and among those groups and decrease the incentives to use dangerous or harmful strategies to achieve performances. This is a forward-focused and relationally-focused funding solution. What's more, because this model pays attention to context and relational structures, it could adapt based on new collaborative input and new information. It would be iterative and focused on creating the conditions for mutual success and wellbeing not *just* rewarding individuals for past performances. Such a shift in the structures of incentivization and collaboration between athletes, funders, and sport organizations could be part of the proactive work generated by reactive responses.

Taking a restorative approach, therefore, is not just about waiting for harm to occur and then reacting -- although it can play that role. Rather this approach requires us to disrupt those systems which contribute to harm and are themselves harmful. Relational theory is the lens through which we can identify those structures and the restorative principles can help us construct new ones. In this way, the focus of a restorative response to an episode of harm is always already looking forward to prevent future harm.

6.1.2 Levels of the Response

In a related way a restorative approach to sport maltreatment would also operate at two levels which are nested inside one another, i.e. the interpersonal and collective. This is different from the current model because, for the most part, we are caught up in reacting to maltreatment at the individual level and do very little thinking about the responsibility of sport organizations themselves. A more comprehensive and holistic response to maltreatment which is oriented toward future justice *must* engage with the structural relations and community surrounding sport and surrounding an episode of harm in order to establish what needs to change at a structural level in order create the conditions for just relations. This means each episode of maltreatment likely requires attending to the needs of the team, club, and sport organization in which it occurs.

It might be helpful to think about a hypothetical to see how these two levels appear together in a restorative approach. A coach neglecting an athlete because they played poorly harms that athlete, but it also harms the team by establishing a contingent relationship of care and attention as a function of performance. A restorative and relationally-focused response to maltreatment requires us not only to attend to the specific interpersonal instance of harm but to take stock of other relationships which might have been affected as well. Thus, while we try to understand who might have been impacted by the coach's decision to neglect a player after a poor performance, we would also ask what sort of structural relations led the coach to that decision, i.e. the collective. Part of our analysis, then, is understanding the coach's context -- not to mitigate their responsibility but to eventually transform those cultural values which normalized such behaviour.

It is critical that within a restorative response to maltreatment we balance the necessity of people being accountable for their actions against their context -- in a way that they can learn and move forward and in way that the systems and structures around them can learn and move forward. This kind of learning can only happen in a space where those directly responsible for some harm feel safe to participate honestly.[525] This means that the coach who ignores an athlete for their poor performance must come to accept that their actions caused harm to the athlete and be accountable for that harm – not penitently but thoughtfully and reflectively. This also cannot be an aloof or impersonal accountability wherein the coach admits their behaviour caused harm, but it is clear they are separating themselves from the behaviour. The coach must come understand, during a restorative process, that their relationship with the athlete has an impact on that athlete and their behaviour reduced that relationship to a contingent transaction. It was no longer about care or concern for the athletes. At the same time, the technical director and/or PSO leadership must come to accept they are connected to this situation and contributed to the conditions for the coach to make the decision they did. During the restorative process these administrators and organizers will learn how their connection to the harm implies a corresponding capacity and power to prevent future harm. Again, this is not to hold the PSO liable but "to determine what needs to be done to prevent a similar thing from happening again".[526] It is key to a restorative response to maltreatment that the sport administrators "acknowledge[e] their responsibilities for the safety and wellbeing of

[525] Jennifer J Llewellyn, Jacob MacIsaac & Heather McNeil, *Facilitators' Report: A Restorative Review of the in-Custody Death of Jason Leblanc* (Halifax, NS: Dalhousie University, 2018) [accessible here: https://digitalcommons.schulichlaw.dal.ca/scholarly_works/421/] [Llewellyn *et al*., *A Death in Custody*] at 5.
[526] *Ibid.*

those in their care and custody and that the systems and procedures clearly did not succeed".[527]

Working at both the interpersonal and collective levels means embracing the fact that much justice work can and should be done at a local level. By building capacity among coaches, technical officials, and administrators to respond in meaningful ways to concerns before they escalate, we could empower the community itself to take more ownership over what justice "looks and feels like" for it.[528] It is not, in other words, about excising the two parties in a dispute but about the community coming around a broken relationship and working together to move forward in a better way. To refer back to our hypothetical: we can imagine creating a space or designated person for an athlete who feels ignored to go to and make known their concern. This same person or space would also be a space within which the coach could learn and grow and respond – not simply defend themselves. This safety to learn is generated, at least, in part by a community with the capacity to think and respond to maltreatment in a different way because the members care about one another and take seriously the impact of their connectedness, i.e. their relationality.

At first blush, what I have just described may seem problematic to some people because it appears to put the work of maltreatment *adjudication* back on the shoulders of overburdened and overwhelmed volunteers or staff. The truth is, however, that a restorative approach to sport maltreatment is not about adjudication by a higher or external authority. If done properly, restorative justice can offer those involved the

[527] Llewellyn *et al*., *A Death in Custody*, *supra* note 525 at 5.
[528] This is a phrase Jennifer Llewellyn often uses in her presentations. It captures more accurately the goal of a restorative process than simply describing justice as something that *is* which manifests on earth. Justice, on a relational account, is about a intuitive sense based on needs and context.

opportunity to work through their issues in a collaborative way which does not necessitate a third-party's decision making.[529] This is, in many ways, opposed to the current model which requires an independent third-party to make decisions for the sport participants. As we saw in chapters 3 and 4 this desire for independence is rooted in legal principles which presume punishment is the goal and that the possibility of infringement of rights necessitates certain procedural protections. In a system which engages in hierarchical state-enforced punishment, then it is important to ensure that the people who might be punished are protected from the infinitely more powerful state. Guided by the restorative principles, we know that restorative justice is not about punishing people or even making decisions about them without them; it is about creating the opportunity for meaningful engagement in establishing conditions for just relations.[530] This, then, alters the way we proceed and does not place the same kind of requirements *vis-à-vis* procedural rights on restorative justice as it would in a more formal punitive and adversarial proceeding. This should assuage some of the fears that a restorative approach to sport centered on the community might sacrifice procedural protections. Rather it enhances the participation of those people who might need procedural protections in a more adversarial process. It engages those most vulnerable to state action in the justice creating process, so that decisions are not made about them but they have the opportunity to participate in their own destiny and creating the conditions for things to go well moving forward.

[529] I discuss facilitators and their difference from third-party adjudicators below.
[530] Bruce P Archibald, *Restorative Justice and the Rule of Law: Rethinking Due Process through a Relational Theory of Rights* (The Nova Scotia Restorative Justice Community University Research Alliance: 2013) at 18.

Relatedly, the fear that a restorative response strategy to sport maltreatment will require the volunteers to do *more* work also falls short here because a restorative approach does not ask them to do the work of lawyers or adjudicators which would be excessive and beyond their capacities. Rather it asks them to have conversations with the people to whom they already have a responsibility to talk; it asks them to assess the needs of those already in their care and under their direction and collaborate with those people when they are at an impasse – not in an authoritarian way but in a supportive and solutions-oriented way. This is not *new work*, but the same work done in a different way. Ultimately, creating capacity at the local level to interrupt early concerns before they become complicated and serious episodes of harm will go a long way to maintaining the wellbeing of all sport participants; reducing the reactive justice work required of the sport participants; and proactively producing relationships marked by equal respect, concern, and dignity.

6.1.3 Facilitated Response

In some instances, attending to a concern or episode of harm will not be possible at the most local level. This might be because the person raising the concern does not trust those in a position of authority at the local level. Or, perhaps, the person in a position of authority is not prepared or equipped to have the conversations necessary due to a conflict of interest or the nature of the concern. For these situations, it will be important to have experienced facilitators available and ready to work alongside the sport participants to find a way to move forward.[531] Their work will not be to take over and

[531] The precise positioning of facilitators within the sport eco-system is a complicated question which deserves further examination. There are benefits to them being independent from the government and sport, but that would also create yet another class of professionals draining money from sport organizational

make decisions but to assist those most affected to determine how to move forward in a good way and create the conditions for locating and constructing a mutually agreeable plan for just relations moving forward.[532] These people are literally facilitators in that they facilitate and do not deliver justice.

The facilitators of a restorative response to *A Death in Custody*[533] provide a helpful description of some of the work that facilitators do to make sure a process is safe and meaningful. They write:

> A restorative approach is not simply about bringing people together in a circle. It requires careful preparation of those involved to ensure they are able and ready to participate. It is also important to build trust with the parties so that they understand and are prepared for the process in which they are going to participate. This work must move along at a pace dictated by the needs of the parties, and some individuals require more time than others. Through numerous meetings and phone calls, facilitators worked to support participants by building relationships with them and helping them to understand the principles and process. The facilitators also met with the parties to understand the situation from their perspectives and experiences and to help them reflect on these experiences and their impacts prior to meeting with other parties. Participants were prepared to share and hear not only what happened, but what is most important about what happened, how they were affected, and to contemplate ways to move forward. This was done by meeting individually or in groups using self-reflection, building supports and thinking through how to respond to difficult questions. Some parties required multiple meetings before they were ready to participate together with others in the process.[534]

This passage is a rich description of many facets of the work a facilitator does, but I want to focus on two components: preparation and participation.

In order to meet the demands of the principle of responsiveness facilitators must prepare the participants and themselves by mapping out the full complexity of the harm and needs of the participant. This process allows each participant the time to understand

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coffers. Similarly, it is unreasonable to recommend that each sport have an expert facilitator ready to do this kind of work.

[532] Cf. Archibald, *supra* note 530 at 18-19.

[533] This report is the result of a restorative process requested by the parents of Jason Leblanc who died of a drug overdose while being held at Cape Breton Correctional Facility for a parole violation after only being in the facility for 14 hours.

[534] Llewellyn *et al*., *A Death in Custody*, *supra* note 525 at 6.

that their participation is about understanding the impact of our connectedness on one another. This preparation will often occur in phases to ensure participants are ready for the next phase. This readiness is not an objective standard identified exclusively by the facilitators but something that comes out of conversations and requires self-reflection on what it means to come together with the other participants. It is not enough, in other words, simply to move through a set of a steps and check a list of investigatory boxes. Rather, facilitation is about working alongside the people affected by harm and helping them untangle the relationships involved.

By framing this phase of a restorative process as preparation rather than simply applying a codified practice or procedure, facilitators are more flexible and adaptable to the needs of those involved. For example, the age of a person who is harmed and/or the person who causes harm will play a large role in determining how the preparation phase plays out. Relatedly, the *nature* (not severity) of the harm is important. Any kind of maltreatment which is creating an unsafe environment for a specific person or group of people must be interrupted as quickly as possible. In some cases, this may mean a police intervention. To be clear, in some cases, the most restorative option is to end a relationship which is causing harm. It might not be permanently ended, but if it is harmful or oppressive then it is not conducive to just relations. However, simply because the police are involved does not mean that the work of justice in the sport community ceases. Although, in those cases, the person who caused the harm will likely be removed from the process or unable to participate the other people will still be able to come together and work through the harm to understand what went wrong at a micro level and how to ensure it does not happen again at a macro level.

Part of the careful preparation facilitators do includes mapping out relationships which allows them to determine who needs to participate in the process. The facilitators, I want to reiterate, are not making any decisions about the outcome of the situation, but they are designing a process whereby those most directly affected and those connected more peripherally can examine and better understand what happened.[535] Restorative justice as a relational theory of justice is committed to meaningful participation which means that if someone is included in responding to an instance of harm then that participation must be capable of affecting the outcome.[536] It must move the needle in some way. In a sport maltreatment scenario: the goal would be to include not only those directly affected (e.g., the athlete) by the harm and the person who caused it but also: those who are indirectly affected (e.g., the other team members); those who are connected to the harm but not maybe not substantially affected (e.g., an assistant coach); and finally those who contributed to the conditions in which the harm occurred (e.g., the technical director or, more broadly, the club or PSO leadership).

This wider inclusiveness of restorative justice often implicates questions around privacy and confidentiality. In the case with Dalhousie Dentistry, the process was private in order to create an environment where people felt safe to be honest and participate fully.[537] It was not confidential in a way which inhibited the future focused trajectory of restorative justice to work toward just relations in the future. It was not, in other words, confidential in the way that many processes are confidential in sport today which ends up protecting the systems from criticism or makes it difficult for people who have

[535] Archibald, *supra* note 530 at 18-19. See also: Llewellyn *et al*. *Dalhousie Dentistry*, *supra* note 343 at 31.
[536] Llewellyn *et al*., "Imagining Success", *supra* note 375 at 302.
[537] Llewellyn *et al*. *Dalhousie Dentistry*, *supra* note 343 at 5.

experienced similar harms to find each other and recognize a pattern. Privacy, in a restorative process, cannot limit the effectiveness of the process but must only enhance it. This means thinking of privacy as a way of protecting people from exposure which would interrupt the work of collaboratively understanding what went wrong and how to move forward. Part of the work of facilitation is working to achieve this kind of privacy in the design and implementation of a restorative process.

To summarize: facilitators design opportunities for those involved to engage with one another based on their needs. The facilitators might also create opportunities for those involved to work with experts from outside the sport community to provide a greater understanding of something. It is not the case that a restorative process would force those harmed to face the person who harmed them. Similarly, a restorative process would not simply be a single conversation in a circle led by a facilitator. Good facilitation allows those engaged in the restorative process to root out any systemic causes or structures which shape relationships in a way that can gives rise to the harm caused. It empowers them to begin creating the conditions for good relationships going forward.[538]

6.1.4 Outcomes of Response

Restorative processes do not target a sanction or punishment as their outcome. The process itself actually does the work of justice which, in our current system, is symbolized by a terminal sanction. The pieces of preparation and work done to bring people together to understand what happened and what went wrong structurally generates a profound collective understanding. With Dalhousie Dentistry, for example, the educational sessions, workshops, and the circles organized for the participants

[538] Llewellyn *et al*. *Dalhousie Dentistry*, *supra* note 343 at 31.

contributed to the outcome of a better understanding of what went wrong and what was needed to move forward in a better way.[539] Repeated again and again, in the statements collected by the participants of that restorative process, is the idea of how much they learned by doing the work *during the process*.[540] I want to emphasize this aspect of a restorative process because it distinguishes restorative justice from settlement-focused mediation.[541] Whereas in mediation the goal is the outcome or the settlement, in a restorative process the goal is partly going through the process itself – the 'journey' – which contains the work of understanding what went wrong.[542] This claim should resonate with the idea discussed in the previous chapter that restorative justice as a relational theory of justice is not about achieving some end state of perfect justice but about securing the conditions for just relations which is understood as an ongoing process and not a static achievement.

Restorative processes often also have more explicit outcomes or agreements for future action,[543] but that the parties came to an agreement is not the conclusion of the restorative process at all.[544] It is important to see that "[a]t the very least, the restorative process includes the time it takes to carry out the agreed upon terms and perhaps beyond".[545] These agreements, therefore, contain an implied term that the principled way

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[539] Llewellyn *et al*, "Dalhousie Dentistry", *supra* note 343 at 36-37.
[540] *Ibid* at 8-16.
[541] Llewellyn, "Legacy", *supra* note 8 at 279.
[542] Llewellyn *et al*, *Dalhousie Dentistry*, *supra* note 343 at 8: one participant refers to the process as a journey. See also Council of Parties, *Journey to Light*, at 5: the former residents of the Nova Scotia Home for Colored Children referred to the restorative process as a "journey to light". I think in both cases the import of the word "journey" is the sense that a restorative process is not a series of procedural checkpoints but the work along the way has substantive and affective value. Cf. Llewellyn & Howse, *supra* note 292 at 68 nt. 110.
[543] Llewellyn & Howse, *supra* note 292 at 68.
[544] Llewellyn *et al*., *A Death in Custody*, *supra* note 525 at 5: The facilitators note that identifying specific outcomes before the process would have undermined the purpose of taking a restorative approach.
[545] Llewellyn & Howse, *supra* note 292 at 68.

of collaborating in the more formal restorative process will continue in the way the parties agree to mutually support one another's adherence to or follow-up for the agreement.[546] This work is ongoing and irreducible to a static order or set of recommendations.[547]

Furthermore, these plans, agreements, or commitments made by the parties in a restorative process will not only attend to the needs of those impacted by a specific harm but also ensure systems and key stakeholders take steps to create the conditions for preventing further harm.[548] In most cases these plans will be collaboratively built by every party who will have a part in supporting the plan's success. This will ensure that no important stakeholders are left to implement or support agreements that they have had no role or input in building.

In the sport scenario these kinds of outcomes have an obvious advantage over the current model wherein the Director of Sanctions and Outcomes imposes a sanction which the sport organization must enforce. Setting aside the reality that the sanction-focused process is overly individualistic and mimics the criminal justice system in problematic ways, this model puts substantial pressure on the sport organizations without including them in the design of the sanction. It assumes a level of enforceability that might not be present in the sport. Instead, a restorative process would include the sport organization and support its participation in a meaningful way at every step. Thus, the outcome, plan, or agreement arrived on by the participants would necessarily reflect the input and

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[546] *Journey to Light*, *supra* note 404 at 478-9.
[547] Llewellyn *et al*, *Dalhousie Dentistry*, *supra* note 343 at 57; and *Journey to Light*, *supra* note 404 at 480.
[548] We see this in the way the commitments in *Dalhousie Dentistry* (*supra* note 343) respond to the harm cause by the Facebook group without focusing on it exclusively but by seeking to build community in a different and more sustainable and healthy way (pp.59-60). Similarly, in the *Restorative Inquiry* there is ample reflection on the preventing abuse in care but also about how to provide better and more robust care for children (p. 507ff).

participation of the sport organization. This approach, thereby, foregrounds the capacity of the sport organization in building and constructing the conditions for justice. These kinds of collaborative plans are not punishments or penalties but pathways or agendas for creating the conditions for the participants in a restorative process to be able to engage in sport in a safe way. There is research supporting far greater compliance with these kinds of plans than simple punishments or probationary rulings handed down from on high.[549]

There will be cases wherein the person alleged to have caused harm may refuse or be unable to participate in a process. There may even be cases wherein the person who was harmed is not willing to participate. In both of these scenarios, a plan will have to be developed to allow the rest of the community to move forward in a good way. This plan may result in a determination that the personal alleged to have caused harm cannot continue to participate in the sport until or unless they are willing to address their actions because it impacts the wellbeing and safety of others. This is not meant as a punishment or even a *quid pro quo*. Rather it is a recognition that in order for us to come together in a way that is truly analogous to our radical relational realities then we have to come together in ways that prioritize mutual recognition of each other in safe and nurturing ways. Refusing to participate in creating the conditions of safety for others disavows this relational position and signals an unwillingness to show up for others in the ways we need to flourish and be well. In the cases where the two parties at the centre of some harm are unable or unwilling to participate in a restorative process then it is up to the community affected by that harm to come together and collaboratively work to identify

[549] Cf. John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002) at 17 and 74-77. See also: John Braithwaite, "Essence of Responsive Regulation" (2011) 44:3 UBC L Rev 475 at 507; and Lawrence W Sherman and Heather Strang, *Restorative Justice: The Evidence* (London: Smith Institute, 2007).

any structural contributions to that harm and seek transform them into structures more conducive to wellbeing.

6.1.5 Summary

To respond to maltreatment in sport we begin by recognizing that we must focus on the impact of our connectedness; take seriously that we are fundamentally related to one another; and that those relations shape our identities, capacities, and wellbeing. This means that rather than constructing narratives around harm which isolate people from one another and presume that decisions happen in a vacuum without context, we will insist that human action occurs in a rich web of relationships shaped by structures outside of their control. We must imagine a response mechanism which does not remove harm or concerns from its relational context. Instead, we should empower the community in which injustice occurs to repair itself and create the conditions for justice relations as locally as possible.[550] Part of this maneuver will require shifting the expectation of people that justice is something that they seek outside of their community by appealing to a service provider (e.g. the courts, a tribunal, or arbitrator). This all means that the first step in responding to sport maltreatment restoratively is to re-ground the responses within the community rather than in some external third-party which excises the harm and severs it from the context in which it occurred.

[550] By locally I do not mean secretly or with risk-avoidant confidentiality. I mean that in some cases, concerns raised early and locally can be resolved quickly and collaboratively without needing to involve or engage external third parties. It will also happen faster and reduce the likelihood of relational breakdown which so often results from adversarial processes. They will remain *private* to the degree necessary to encourage full meaningful participation of those involved but not in a way that would shield someone from accepting and working through responsibility for harm they caused. See *Journey to Light*, *supra* note 404 at 407 for a discussion taking responsibility in a restorative context which is not about punishment but about providing the support to deal with outcome of accepting responsibility for causing harm.

6.2 Conclusion

Restorative justice offers us a new way for reacting to maltreatment by grounding our responses in relational principles. By constructing mechanisms which make possible a thorough application of those principles we ensure that our responses to harm are relational and restorative rather than simply corrective or punitive. The implications I describe above provide some examples of what would shift in those mechanisms and policies we examined and critiqued in Chapter 5 were sport to take a restorative approach.

Many of the concerns raised by Stephanie Dixon's collaborators could be responded to if not assuaged by attending to maltreatment guided by Llewellyn's restorative principles. Firstly, those who have been harmed will not be sidelined while investigators and lawyers argue about which procedural rights accrue to the respondent. Instead, the person who was harmed will be supported throughout their participation in identifying their needs and constructing the conditions for justice and wellbeing moving forward. Similarly, those alleged to have caused harm will not be forced into an adversarial process aimed at punishing them. Rather they will engage in rebuilding and restoring the relationships they were responsible for damaging, so that they can become part of the solution.[551] They will be able to take responsibility for the harm they caused in a safe and productive way which allows them to learn and grow and, hopefully, reintegrate into the community.[552] Finally, restorative justice in sport would create space for the sport community in which harm occurred to come together and support its members in rebuilding the damaged relationships as well as coordinate resources and

[551] Llewellyn, "Responding", *supra* note 8 at 136.
[552] *Ibid*.

develop plans for moving forward in a better way which will protect against further harm.[553] As one participant from *Dalhousie Dentistry* puts it: "This is not about proving what we learned, it is about using what we've learned. This is not about public relations, it is about inspiring real change and improving our community".[554]

In order to make this shift we will have to change how we evaluate justice pathways. Llewellyn *et al*, reflect on the difficulty of shifting how we measure and evaluate success in the criminal justice applications of restorative justice. They write:

> We might expect to see measures of the impact of restorative justice on social relationships, community-building, and skills that generate enhanced positive social attitudes and behaviours, to name a few. Measures of success could highlight collaborative processes, improvements in skills, understanding, social relations, and the creation of a stronger, positive sense of community.[555]

Whitbeck echoes the obstacle to transformative or paradigm shifting when she says:

> It is not easy to make clear an ontological proposal when basic concepts are involved. The difficulty is that the terminology in which the new ontology is to be articulated is automatically interpreted in terms of the accepted ontology…[556]

The point is that part of the process of taking a restorative approach is to innovatively redefine and reorient the way we define justice. If we insist on relying on metrics of evaluation which are rooted, ultimately, in an individualistic, transactional, and legalistic framework then restorative justice will seem unworkable. Part of the project of taking a restorative approach to sport and shifting culture then becomes "includ[ing] outcomes that more closely relate to the aspirations of a relational approach", i.e. being more collaborative, human-centered, inclusive, and educative.[557]

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[553] Llewellyn *et al*, *Dalhousie Dentistry*, 343 at 57.
[554] *Ibid*.
[555] Llewellyn *et al*, "Imagining Success", 375 at 308 (Citations omitted).
[556] Whitbeck, "A Different Reality", *supra* note 327 at 74.
[557] Llewellyn *et al*, "Imagining Success", *supra* note 375 at 308 nt. 105.

Shifting sport culture to be more restorative will not happen in one great swath of action. It is also not reducible to a report or even a set of policies. Rather it requires "the patience to unlearn old ways of thinking and being, and to build capacity to think and work in different ways".[558] Change will accumulate over time as we learn new things about what it means to create a sport community organized around human flourishing rather than elite performance.

Thus, the question of safety in sport is not simply a question of more independent or more punitive or more powerful complaint mechanisms. Rather it is a broader question of shifting the culture of sport not only so that we respond differently when things go wrong and someone is harmed but also so that we work to understand what is required to make things go well. We cannot continue to invest in sport infrastructure that sees safety as delinked from funding incentives, governance and regulation models, and coaching education. Each of these pieces of the sport ecosystem contribute to the way in which we show up for one another in sport and the permissible forms of relationships that can take shape.

I have proposed that in order to improve our response mechanisms for maltreatment as well as transform the culture of sport to be safer on the everyday, we ought to take a relational turn and ground our understanding of the organization, delivery, and administration of sport in the ontological premise that we are always already in relation to one another. This new perspective will reveal to us that we ought not define in advance what justice is for sport because justice is necessarily a collaborative, dynamic, and on-going effort oriented toward mutual wellbeing. The substance of justice and the

[558] *Journey to Light*, *supra* note 404 at 379.

details of its constitution exist on a hermeneutic horizon which requires constant attention and re-interpretation not as something to be perfectly or finally understood but as something to be constantly re-discovered in and through our connectedness. Safer sport, therefore, is sport which takes seriously that our connectedness is integral to wellbeing and that the way we engage in sport as athletes, coaches, volunteers, officials, or spectators must reflect the importance of our connection to one another.

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