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LAW AND ATHLETE DRUG TESTING IN CANADA

JOSEPH DE PENCIER*

The use of banned performance-enhancing drugs is cheating, which is the antithesis of sport. The widespread use of such drugs has threatened the essential integrity of sport and is destructive of its very objectives. It also erodes the ethical and moral values of athletes who use them, endangering their mental and physical welfare while demoralizing the entire sport community.

Mr. Justice Charles Dubin

I. INTRODUCTION**

Athlete drug testing, or doping control, is the testing of athletes for use of banned substances or practices which enhance athletic performance. The use of banned substances or practices is against the rules of virtually all "amateur" sports. While banned substances or practices vary from sport to sport, those proscribed by the Medical Commission of the International Olympic Committee are increasingly recognized and applied. Doping control is the principal means of deterrence and enforcement for this pernicious form of cheating in sport.

Doping control involves a classic legal tension between group and individual rights. Athletes as a group have an interest in fair competition. Doping is against the rules of sport and is, therefore, cheating. However, individual athletes have an interest in fair application of the rules, if only to avoid errors or fraud. Findings that an individual athlete has cheated by doping must bear impartial scrutiny. There must be fair

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** This article purports to be up-to-date as of December 31, 1993.
procedures for an individual to challenge a finding of doping. Doping control also raises potential conflicts between public law and private rules. For example, possession of a banned substance may be a criminal offence for all individuals as well as being punishable according to the rules of sport in the case of individuals who are accredited athletes. More fundamentally, the procedures for doping control, while in accordance with private rules of sport, may be contrary to fundamental domestic law such as constitutional rights. At an institutional level, both public bodies and private self-governing sport organizations may have a role in conducting doping control. Lawyers are increasingly becoming more active in doping control, as drafters and administrators of testing and review protocols, as advocates for alleged dopers or embattled drug testers or as arbiters deciding whether findings of doping ought to stand in the face of procedural or other challenges.

In Canada, all of these legal aspects of doping control have been experienced in the realm of so-called “amateur” sport. At the same time, Canada is an internationally-recognized leader in addressing the use of performance-enhancing substances and practices. The Canadian experience both reflects and diverges from that of other sporting nations governed by the rule of law and provides a useful yardstick for assessing circumstances and progress elsewhere.

This article both describes the development of the current regime for doping control in Canada, and outlines particular legal challenges to doping control, concrete and hypothetical. The legal issues surrounding doping control in a particular jurisdiction may raise the fundamental sorts of matters described above. It appears that the legal aspects of doping control will assume greater prominence as the variety of legal means for challenging athlete drug testing are explored and exploited. Until education, changes in the values of sport, social change at large, or other means of discouraging and preventing doping by athletes have greater effect, doping control and its attendant legal questions are likely to occupy the attention of those concerned with cheating in sport by the abuse of drugs.

This article does not address drugs and drug testing in “professional” sports in Canada. Player drug testing is just emerging in the National Hockey League, the Canadian Football League (or its American counterpart, the National Football League), professional baseball, the National Basketball Association (which recently awarded a franchise to Toronto, Ontario), bodybuilding and other commercialized sports which cater to television. Furthermore, principles of contract law, collective
bargaining, the right to earn a livelihood and other predominant areas of
the law make this a discreet subject for academic exposition.

II. THE LEGAL BASIS FOR DRUG TESTING OF ATHLETES

A. Federal Government Jurisdiction and Involvement
   in Amateur Sports

Once the sole domain of sports administrators and subject only to the
internal rules governing sport, doping control has become increasingly a
matter of public policy interest in Canada. The federal government has
played a central role in the development and implementation of doping
control, notwithstanding the fact that sports are governed at the national
level by private governing bodies. This article begins with the evolution
of the government's role.\(^1\) An understanding of that role is necessary to
understand the forces that led to the creation of an independent and
arms-length agency responsible, among other things, for the coordina-
tion and the conduct of doping control in Canada for all “amateur”
sports. Coincident with or as a result of expanding government interest,
the legal aspects of doping control have become increasingly complex.

Ironically, the fundamental legal basis for doping control in Canada
is not regulatory; it is contractual. Arguably, the government of Canada
has no authority to regulate sport. But it provides funds to national
sport governing bodies on the condition that they enact rules against
doping. Individual athletes, who must be members of their sport’s gov-
erning body to compete at the national and international level, agree to
abide by anti-doping rules and procedures as a condition of membership
and eligibility. Furthermore, individual athletes and coaches may be eli-
gible to receive federal government subsidies. One condition of funding
is the specific written agreement to follow applicable anti-doping rules
and doping control procedures. Urine sample collection has been pro-
vided independent of national sport governing bodies and government
on a contractual basis, first by the Sport Medicine Council of Canada,
and now by the Canadian Centre for Drug-free Sport. By and large, the
government of Canada has paid the bill for doping control.

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1. The influence of government in sport in Canada cannot be underplayed. It is one of
the most significant features of organized sport in Canada, especially in the last thirty years.
"Because of the significance of sport in our culture, the Government [sic] of Canada, and the
provinces and municipalities to a lesser degree, have over the years expended a great deal of
public money in increasing amounts to encourage and promote athletic programs." Charles L.
Dubin, 1990 Report of the Commission of Inquiry into the Use of Drugs and Banned Practices
Intended to Increase Athletic Performance xv. [Hereinafter Dubin Inquiry or Dubin Report].
1. The Beginnings of Federal Government Interest in Sport

A number of authors have traced the inception and growth of federal government involvement in sport. The modern era might be said to start with the Second World War and a continuing concern about fitness and Canada's military capacity. Recruiting for the armed forces revealed a substantial portion of the male population to be physically unfit. One response was the short-lived National Fitness Act, legislation "to promote physical fitness of Canadians." Even after the demise of that legislation, the federal government's interest did not disappear. In the period after the repeal of the National Fitness Act, Parliamentarians expressed concern about a lack of national policy for both physical fitness and for Canadians' performance in international competitions.

2. Federal Constitutional Jurisdiction

Jurisdiction for a federal spending foray into the field of sport is not at all clear. Prime Minister St. Laurent's Minister of National Health and Welfare, Paul Martin, maintained that jurisdiction over sport was a provincial (and municipal) responsibility. According to Barnes, since sports and recreation are aspects of health, culture and education, the more general and direct responsibility falls to local, municipal and provincial bodies. He also notes that sports litigation more commonly raises

2. See, e.g., COR WESTLAND, FITNESS AND AMATEUR SPORT IN CANADA: THE FEDERAL GOVERNMENT PROGRAMS—AN HISTORICAL PERSPECTIVE (1979); MACINTOSH ET AL., SPORT AND POLITICS IN CANADA, ch. 2 (1987) (and the various sources they cite).


5. WESTLAND, supra note 2, at c. 5. Other influential factors included the widely reported June 30, 1959, speech of the Duke of Edinburgh to the Canadian Medical Association decrying a general lack of fitness among Canadians and a joint conference of the Canadian Medical Association and the Canadian Association for Health, Physical Education and Recreation held in March, 1961. Id at c. 13; DON MORROW ET AL., A CONCISE HISTORY OF SPORT IN CANADA, 326 (1989). In Recent Developments in Sports Law, 1988-1991, 23 OTTAWA LAW REVIEW 623 (1991), John Barnes comments about the continued validity of the factors motivating the federal government position leading up to enactment in 1961 of the Fitness and Amateur Sport Act:

The Fitness and Amateur Sport Act was first enacted in a Cold War climate, and the review [now completed in the form of the MINISTER'S TASK FORCE ON FEDERAL SPORT POLICY, SPORT: THE WAY AHEAD (1992)] must look to happenings in Eastern Europe and the former Soviet Union as well as those in Seoul: perhaps the public funding of capitalism's warriors is unnecessary now that the Communists have been beaten.

Id at 637-638 (note omitted).

6. MACINTOSH, supra note 2, at 19.
issues in provincial civil law, notably the general law of torts, contracts and administrative law.\textsuperscript{7}

However, the federal government may supplement private or provincial support by making grants in exercise of federal spending power, providing the intervention does not amount to a regulatory scheme relating to matters under provincial jurisdiction.\textsuperscript{8} The federal government’s presence in health and education, areas in which it has little or no regulatory authority, rests on proper exercise of its spending powers.\textsuperscript{9}

3. The Fitness and Amateur Sport Act

The \textit{Fitness and Amateur Sport Act} was enacted in 1961.\textsuperscript{10} According to the debates in Parliament, “[t]he general enthusiasm for sport as an expression of national pride was supported by a belief that the expansion of international sport competitions was one of the ways in which the Cold War could be diffused. . . . There is no evidence in the House debate that sport organizations and interested individuals made any great attempt to influence or change the Act.”\textsuperscript{11}

Section 3 of the Act sets out its objects “to encourage, promote and develop fitness and amateur sport in Canada.” According to Section 3, the Minister of National Health and Welfare has a variety of financial and other means at his or her disposal to accomplish those objects. Furthermore, pursuant to Section 4 of the Act, grants may be made to any agency, organization or institution carrying on activities in the field of fitness or amateur sport.\textsuperscript{12} The government of Canada takes the view that sections 3 and 4 of the Act combine to clothe it with sufficient legal authority to fund sport. This now includes the funding of doping control.

\begin{itemize}
\item \textsuperscript{7} Barnes, \textit{supra} note 3, at 7.
\item \textsuperscript{9} According to Barnes, the enumerated constitutional bases for federal activity may include the residual authority of Parliament to make “Laws for the Peace, Order, and good Government of Canada” (s. 91 of the \textit{Constitution Act, 1867}, 30 & 31 Victoria, c. 3 (U.K.)), Parliament’s jurisdiction in trade and commerce (s. 91(2)), taxation (s.91(3)), the military (s.91(7)), criminal law (s.91(27)) and immigration and citizenship (ss. 91(25) and 95), or more generally, based on a claim that sport is of some national or international significance. Barnes, \textit{supra} note 3, at 8, 49-51.
\item \textsuperscript{10} R.S.C. 1985, ch. F-25.
\item \textsuperscript{11} MacIntosh, \textit{supra} note 2, at 27.
\item \textsuperscript{12} A branch of the Department of National Health and Welfare, currently called Fitness and Amateur Sport Canada, was established pursuant to section 12 of the Act, which authorizes the appointment of “such officers, clerks and other employees” as necessary to administer the Act. Sport Canada is the unit with specific responsibility for elite or “high performance” sport.
\end{itemize}
Since passage of the Act, the focus of government in sport has changed. From an early concern with the general health and fitness of Canadians, involvement has come to focus on the more specialized field of competitive sport, especially on high-performance sport. As Mr. Justice Charles Dubin noted in his report on Ben Johnson’s positive drug test, with that increased emphasis came, in turn, a corresponding increase in the level of government funding:

But government funding comes at a price. From simply being a means for improving the general health of Canadians, government funding of sport has become a means for promoting the national, international, and social policies of the country. Sport is relied upon to unite the country and to express Canadian culture and identity; it is used as an instrument of social policy in redressing gender inequality and discrimination against people with disabilities and members of minority and lower socioeconomic groups; it is used to ensure compliance with federal government policies on bilingualism and regionalism; and it is used to express governmental disapproval of political decisions by other governments. Perhaps most of all, sport is relied on to give Canada a high, international profile as a modern, thriving, healthy, and prosperous nation that values the ideals of fairness and honesty.  

Commentators have noted that federal funding has bred financial dependency on the part of sport governing bodies. This dependency has facilitated government imposition of universal policies on all sport governing bodies as a condition of funding. Such has been the case with doping control.

B. Doping Control: The 1983 Sport Canada Policy

The history of doping in sport is well documented. As Dubin noted, until 1983, only two Canadian athletes had tested positive for

14. See, eg., Macintosh, supra note 2, pp. 148-50; Morrow, supra note 5, at ch. 12; Dubin Report, supra note 1, at 529-35. According to the Minister’s Task Force on Federal Sport Policy, by 1989 national sport organizations received an average of 70% of their funding from the federal government, almost exclusively from Fitness and Amateur Sport. MINISTER’S TASK FORCE ON FEDERAL SPORT POLICY, SPORT: THE WAY AHEAD 217-223 (May, 1992) (“Task Force Report”).
banned substances. At that time, both nationally and internationally, anti-doping rules and procedures for doping control were weak and inconsistent. However, a series of events shattered Canadian complacency: well-publicized positive tests of Canadian and other athletes at the 1983 Pan American Games; the hasty abandonment of those games by other athletes apparently to avoid testing; and the arrest at Mirabel Airport in October, 1983, of four members of the Canadian national weightlifting team in possession of a vast quantity of undeclared anabolic steroids.

The federal government's response was quick if unilateral. In December, 1983, Drug Use and Doping Control in Sport—A Sport Canada Policy ("1983 Policy") was issued. It directed sport governing bodies to develop anti-doping plans, including plans for the testing of athletes at competitions and in training, and established withdrawal of federal funding as a penalty for a positive test. Funds were allocated for testing. The Sport Medicine Council of Canada was identified to oversee testing and advise Sport Canada on doping control.

The premise underlying the government's action was that sport governing bodies were incapable or unwilling to deal with doping, even if anti-doping rules were well-established in some of the more problematic sports. The Dubin Report came to much the same conclusion six years

17. Dubin Report, supra note 1, at 90.
19. According to Macintosh,

[Hervieux-Payette made a spontaneous statement that Canadian sport federations must take immediate steps to stop their athletes from using performance-enhancing drugs or face the prospect of losing government funds. Sport Canada commenced work immediately on the development of a comprehensive plan to ensure that sport governing bodies were taking adequate measures to discourage athlete steroid and drug use."
Supra note 2, at 149.
20. See, e.g., Dorothy Dickie, Passing the Olympic Test, 8 CHAMPION 7, 9 (August, 1984) (giving... then Director of Sport Canada Abby Hoffman's comments about the failure of weightlifting's governing bodies to deal with doping); VYV SIMPSON AND ANDREW JENNINGS: THE LORDS OF THE RINGS: POWER, MONEY AND DRUGS IN THE MODERN OLYMPICS, ch. 15 (1992). The former Chief Medical Officer of the United States Olympic Committee also strongly endorses the view that sport governing bodies have been ineffective in policing their own anti-doping rules because of financial and other conflicts of interest. Voy, supra note 16, at 101-113, 174. As former American sprinter and coach Pat Connolly testified:

"In 1983 when I heard about the USOC's [United States Olympic Committee] pre-Olympic testing program that was allowing our athletes to find better ways to keep from being detected by official testing, I felt betrayed—like a child whose parents had deserted her." Senate Judiciary Committee Hearings on Steroid Abuse in America.
C. The Sport Medicine Council of Canada

Until 1991, doping control in Canada was conducted by the Sport Medicine Council of Canada, through its Committee on Doping in Amateur Sport.

The authority of the Council was derived from the 1983 Policy and was made operative through direct government funding to the Council for the provision of doping control services and advice. Consistent with the 1983 Policy, sport governing bodies were required by Sport Canada to look to the Council to conduct doping control. The relationship between the Council and the Government of Canada with respect to doping control was of the same contractual nature as now exists between the Canadian Centre for Drug-free Sport and the government.

Parallel to these contractual bases for doping control, sport governing bodies for "Olympic" sports and their members were required by the Canadian Olympic Association, and often by their international sport federations, to have in place anti-doping policies including unannounced doping control. Like the government of Canada the Canadian Olympic Association relied on the Sport Medicine Council of Canada for Canadian doping control. The 1984 Canadian Olympic Association's "Policy on Doping and Drug Usage" and a subsequent revision in 1989 recognized the role of the Council.

D. Doping Control: The 1985 Sport Canada Policy

The 1983 Policy was revised effective September 5, 1985, by the Drug Use and Doping Control in Sport—A Sport Canada Policy Update ("1985 Policy"). Along with some reorganization of the policy's provisions, new sections were added to provide for "ad hoc random doping control," to extend the sanctions to "individuals proven to have violated anti-doping rules involving anabolic steroids" and to provide for an appeal to the Minister of State for Fitness and Amateur Sport from the withdrawal of eligibility for federal funding. This was the policy in force at the time of the 1988 Summer Olympics in Seoul. As modified by the 1991 Canadian Policy on Penalties (which is discussed below), the 1985 Policy remains central to the anti-doping conditions Sport Canada attaches to federal funding of sport organizations and individuals.

The 1985 Policy noted the role of the Sport Medicine Council of Canada, especially in the production of the Doping Control Standard Operat-
ing Procedures, setting out the mechanics of athlete drug testing. These procedures are patterned after and entirely consistent with the International Olympic Charter Against Doping in Sport and its annexes. By 1988, the expenditure for testing alone was in excess of $500,000.

E. The Dubin Inquiry

Notwithstanding the 1983 and 1985 Policies, between 1983 and 1988, several Canadian athletes were disqualified for using anabolic steroids—a matter of increasing concern to the officials of Sport Canada. In 1988, four of the seven weightlifters selected to represent Canada at the Seoul Olympics were disqualified after testing positive for anabolic steroids prior to their departure for Seoul. Of course, Ben Johnson was disqualified following the completion of the 100 meter event when he also tested positive for anabolic steroids. On his return to Canada, Johnson (among many others) requested a thorough public inquiry into the circumstances surrounding his disqualification.

Mr. Justice Dubin, then Associate Chief Justice and now Chief Justice of Ontario, was named by the Government of Canada to conduct a public inquiry and directed to make recommendations “regarding the issues related to the use of such drugs and banned practices in sport...” In his report, Dubin catalogued the failings of anti-doping to date to include its narrow focus on athletes and their positive tests. He concluded that “[t]he failure of many sport-governing bodies to treat the drug problem more seriously and to take more effective means to detect and deter the use of such drugs has also contributed in large measure to the extensive use of drugs by athletes.” Dubin then pointed to the failure of Sport Canada to live up to its responsibilities as spelled out in the 1983 and 1985 Policies.
the conclusions and recommendations of the Dubin Report, Dubin commented that the Sport Canada 1983 Policy and 1985 Policy were variously "ineffective and were resisted," "not consistently enforced," "many athletes and sport bodies ignored the [1985] policy," and "provisions were honored in the breach." 30

Dubin concluded that a new approach needed to be taken to ensure that the government's anti-doping policies were put into practice. A central component of the new approach should be an independent and impartial agency in charge of anti-doping matters, including doping control. Dubin recommended that the Sport Medicine Council of Canada be given expanded responsibilities and assume the leadership in anti-doping. 31

F. Doping Control: The 1991 Policy on Penalties for Doping Infractions

One of the responses to the Dubin Report was the Policy on Penalties for Doping Infractions, released September 17, 1991. Subsequently revised as the Canadian Policy on Penalties for Doping in Sport, the heart of the document addresses the penalties for "doping infractions" (the use of banned substances or practices) and "doping related infractions" (infractions other than use, such as counseling others to use banned substances, avoiding doping control or supplying banned substances). The minimum penalty of four years for an infraction, and reciprocal recognition of penalties imposed by individual sport organizations, reflects a broad consensus within the Canadian sporting community.

The Canadian Policy on Penalties for Doping in Sport is particularly noteworthy for providing a framework for the determination of "doping related infractions." Use of a banned substance or practice is not necessarily the isolated and independent act of an athlete—often far from it. The actions of coaches, trainers, team physicians, financial managers, or fellow athletes, that promote or contribute to a "doping infraction" are as deserving of punishment as those of the doper, and likely more so.

However, "doping related infractions" are less straight forward because they are not proven by the well-established and relatively conclusive positive test. By definition, the "doping related infraction" requires proof by other means. The Dubin Inquiry investigated and made findings that "doping related infractions" had occurred (for example, in the cases of track coach Charlie Francis and weightlifting coach Andrezj Ku-

30. Id.
31. Id. at 538-39, recommendation 11.
lesza). Leaving aside the question of the definition of “doping related infractions,” their determination in particular cases is closely bound with the requisite investigation which takes the place of the laboratory test results for “doping infractions.” It remains to be seen whether Canadian sport organizations, including the Canadian Centre for Drug-free Sport (described in the next section), will be able to conduct effective investigations.

As with previous government imposed or initiated anti-doping policies, the *Canadian Policy on Penalties* became operative by virtue of each sport governing body adopting it through its own constitutional processes. This involved amending the anti-doping policies and the rules of each sport to reflect the *Canadian Policy on Penalties*, including providing for the activities of the Canadian Centre for Drug-Free Sport. Virtually all sport organizations agreed to the key definitions (“major” and “minor,” and “use” and “non-use” doping infractions) and the sport eligibility and direct federal funding penalties set out in the document. Through the first half of 1992, each is incorporating these provisions into their own rules through their own constitutional provisions for rule changes, including changes to anti-doping policies and rules.32

**G. The Canadian Centre for Drug-free Sport**

Another major response to the adoption of the recommendations of the Dubin Report was the creation of the Canadian Centre for Drug-free Sport. The Centre was not created by legislation.33 It is an independent agency incorporated pursuant to Part II of the *Canada Corporations Act*.34 Letters Patent were issued April 29, 1991, and recorded by the Department of Consumer and Corporate Affairs on June 20, 1991.35

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32. The current version of the *Canadian Policy on Penalties for Doping in Sport* is Appendix 5 to the *Doping Control Standard Operating Procedures*, supra note 21.

33. This was a conscious decision. First of all, creating the Centre and giving it by statute the regulatory mandate it has would likely have been beyond federal power as intruding on provincial jurisdiction over “property and civil rights” and other matters. Secondly, section 90 of the *Financial Administration Act*, R.S.C.1985, ch. F-11, precludes the creation of federal Crown corporations except as authorized by statute. Even if the constitutional issue could have been overcome, there was concern that the necessary legislation would take too long to move through Parliament. Because the Dubin Report strongly urged that doping control be conducted by an independent (of government and of sport governing bodies) entity, it was decided that an independent, federally incorporated and non-profit body would best respond to Dubin’s recommendations while avoiding problems of legal constitution and capacity.


35. The Canadian Centre for Drug-free Sport was originally incorporated as the Canadian Anti-Doping Organization. This was a generic title derived from a proposal made in the fall
The Centre became operative in September, 1991, by virtue of a joint announcement of the Minister of State for Fitness and Amateur Sport and the Centre's Chairman, Dr. Andrew Pipe. The press conference at which the Minister announced the Canadian Policy on Penalties also heralded the Centre's inception. During the period from the issuance of the Centre's Letters Patent in April, 1991, until the September joint announcement, the Sport Medicine Council of Canada continued to conduct doping control on behalf of the Centre.

A fundamental premise behind mandating the Canadian Centre for Drug-Free Sport with the conduct of doping control is that the drug testing of athletes must be vested in a disinterested agency. It was felt that the problems that led to the 1983 Policy and which were commented on so pointedly by Commissioner Dubin could be addressed in no other way. As discussed above, others have reached the same conclusion:

The leaders [of sport governing bodies] must resolve their conflicts of interest. As Dr. [Sic] [Robert] Voy observes, too often "the fox looks after the henhouse."[Sic] Testing must be entirely independent of national and international sports bodies, unaffected by their preoccupation with medals and money. There has to be proper accountability.36

The Centre has an independent board of directors who are not government nominees or appointments. The Centre's objects include developing and implementing rules and procedures regarding the use and detection of banned substances and prohibited methods in Canadian sport. Those objects also include participating in and providing leadership to the international campaign against doping in sport. The Centre's activities may be carried out throughout Canada and elsewhere. The Centre is currently funded entirely by the government of Canada. The Centre receives its funds in return for conducting certain anti-doping activities, including doping control.

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36. SEBASTIEN COE ET AL., MORE THAN A GAME SPORT IN OUR TIME 73 (1992). See also supra note 20 and accompanying text.
H. Federal-Provincial Agreement: The Canadian Policy Against Doping in Sport

Yet another part of the federal government's response to the Dubin Report was to seek federal-provincial agreement on a comprehensive approach to anti-doping at both national and provincial levels. In November, 1991, a meeting of the federal Minister and his provincial and territorial counterparts endorsed and adopted the Canadian Policy Against Doping in Sport. The document specifically recognizes the Canadian Centre for Drug-free Sport's role as the Canadian body responsible for doping control.

I. The Authority to Test Foreign Athletes

The authority of a Canadian anti-doping organization to test certain foreign athletes has several sources. It can derive informally from ad hoc requests from the doping control authorities of other countries or international sport federations. It also springs from the Trilateral Anti-Doping in Sport Agreement between the governments of Australia, Canada and the United Kingdom, reached in December, 1990 ("Trilateral Agreement"). The Trilateral Agreement also provides for exchanges of information and expertise, reciprocal assessment and evaluation, and coordination of both anti-doping procedures and policies. In the fall of 1991, Norway adhered to the Trilateral Agreement. France, Switzerland and New Zealand, among other countries, have expressed interest in becoming parties.

Section 1.D of the "Operational Plan for Testing" of the Trilateral Agreement specifically provides for the testing of one party's athletes by another party in a country not party to the Trilateral Agreement. In Canada, responsibility for the doping control provided by the Trilateral Agreement and its "Operational Plan for Testing" resided first with the Sport Medicine Council of Canada. Like all Canadian doping control obligations, it was then assumed by the Canadian Centre for Drug-free Sport on inception of its operation.

37. Memorandum of Understanding Between the Governments of Australia, Canada and the United Kingdom Concerning the Reciprocal Development and Enforcement of Measures Against Doping in Sport (1990-91) (on file with author).
III. POTENTIAL CHALLENGES TO DOPING CONTROL IN CANADA

A. Introduction

Robert Solomon of the University of Western Ontario's Faculty of Law has suggested that in analyzing the legal foundations of employment drug testing in Canada, one ought to examine contractual rights and obligations before moving to legislative influences. Given that doping control is conducted by agreement of the interested parties, the same starting point is appropriate in this discussion of potential legal challenges to doping control.

Even in the absence of specific enactments, doping control has become a matter of public interest and government policy. Doping control in Canada is not a private matter because of the role of government in doping control in Canada. Therefore, there is a special need to consider potential challenges rooted in constitutional, administrative and human rights law. So while doping control becomes increasingly formalized (and legalized) in the collective interest of “clean” athletic competition, developments in Canadian law have enhanced individual rights. While largely unproven forms of attack, they are likely to provide disgruntled individual athletes, coaches, or others a wide choice of possible legal weapons.

There is one important characterization on which the following discussion is based: athletes are assumed not to be “employees.” It has been strongly advocated that the Canadian system of direct financial assistance to elite athletes constitutes a form of employment. Indeed, at least one independent agency of the government of Canada appears to
assume this is already the case.\textsuperscript{41} Barnes notes that athletes' duties resemble those of contracted workers and he comments on the modern meaning of "amateur athlete:"

The term "amateur" no longer means "unpaid," but may be used to refer to athletes who are not signed to professional employment contracts or affiliated with commercial circuits. Amateur sports federations now focus on regulating payments and defining eligibility, rather than perpetuating the myth of non-materialistic purity. Amateur athletes include children, student athletes and recreational participants. They also include state-funded, high performance competitors who are subject to contractual agreements with NSOs [national sport organizations] and who receive grants or allowances from government agencies. A few of these competitors are able to market themselves to generate private income from endorsement contracts, prizes and payments for appearances.\textsuperscript{42}

If athletes receiving federal funding or other sources of income ought to be considered government employees or some form of independent contractor, the analysis that follows might be different. For example, Canadian human rights legislation does more to protect an individual's right to make a livelihood than it does the right to participate in organized sport. Employment drug testing would likely import different legal considerations in contract law than consensual doping control. This is not to mention the plethora of employment and labor-related legislation enacted primarily at the provincial level (providing for workers' compensation, occupational health and safety, minimum wages, collective bargaining, and the like) that might apply and impact upon doping control.

However, the more conservative view discounts "amateur" athletic endeavour as employment. The Dubin Report does speak of athletic "careers" but notes that federal funding through the Athlete Assistance Program is designed to provide "modest financial support" and "not to provide for a professional athletic career but to aid the athletes in pre-

\textsuperscript{41} The Privacy Commissioner of Canada has equated receipt of federal funding with employment. \textit{Office of the Privacy Commissioner of Canada, Drug Testing and Privacy} 43-44 (1990) (discussing drug testing of athletes).

\textsuperscript{42} Barnes, supra note 5, at 674 (notes omitted). Even this definition is not without its difficulties, at least with respect to the Olympics. By any definition, the Olympic Games now includes the participation of full-blown professionals in many sports (such as tennis, basketball and hockey). This is a result of the Olympic movement's abandonment of the traditional concept of amateurism in favour of eligibility as determined for each sport by its international federation.
paring for their careers on retirement from athletic competition.\textsuperscript{43} The status quo would appear to be that "amateur" athletic participation, for remuneration of any kind, should not yet be equated with employment, at least not on the basis of receipt of federal funding. From a strictly legal perspective, this article adopts the view of Commissioner Dubin that federal funding to athletes is entirely \textit{ex gratia} and that no athlete is entitled by right to be funded. If an athlete is denied funding for refusing to comply with conditions for funding, such as participation in doping control, the athlete is not being denied any right.\textsuperscript{44} That is not to say that athletes may not have a very real economic stake in and motivation for maintaining their eligibility to participate in sport in the face of a doping infraction.\textsuperscript{45} However, query whether such an economic interest transforms an athlete into more than a participant in sport.\textsuperscript{46} Accordingly, this article has not anticipated challenges to doping control based on employment law or legislative protections (such as human rights enactments) addressing employment.\textsuperscript{47}

\textsuperscript{43} Dubin Report, \textit{supra} note 1, at 533. The most recent annual report of Fitness and Amateur Sport Canada notes three components of the Athlete Assistance Program: financial assistance to defray living and training expenses, provision of tuition support; and extended assistance for two semesters following the end of a competitive career. \textit{Fitness and Amateur Sport, Annual Report 1990-1991, supra} note 15, at 20.

\textsuperscript{44} Dubin Report, \textit{supra} note 1, at 491.

\textsuperscript{45} A cyclist's loss of opportunity to participate at the Seoul Olympics has been valued at $20,000 by a Canadian court. \textit{Gillmour v. Laird}, (1989) 13 A.C.W.S. (3d) 302 (B.C.S.C.), cited in \textit{Barnes, supra} note 5, at 694.

\textsuperscript{46} Chapter 21 of the Task Force Report, contains the results of a 1989 survey of annual income of elite high performance amateur athletes receiving federal assistance through the Athlete Assistance Program ("AAP"). Surveyed athletes had an average annual income of $15,931, of which just over half ($8,050) was "sport-related" \textit{including} the AAP stipends. Of those surveyed, only 18\% reported receiving appearance fees or prize money, only 16\% reported endorsement or sponsorship income, and only 5\% reported a "professional athlete salary" which averaged only $7,664. The Task Force Report also notes that the average annual income of $15,931 is skewed by the small percentage earning higher incomes and that most AAP athletes earned less than the average. This suggests that "full-time" athletes are hardly "fully" paid athletes and certainly belies the notion that the majority of elite athletes could claim that their livelihood depends on sport. Task Force Report, \textit{supra} note 14, at 195-96.

B. Contractual Issues

Contracts and agreements are ubiquitous in doping control. By agreement with the government of Canada, the Canadian Centre for Drug-free Sport agrees to provide doping control. Government funding to sport governing bodies is contingent on sports having anti-doping policies and programs and assisting the Centre to conduct doping control. Athletes agree to participate in doping control as a condition of receiving federal funding through the Athlete Assistance Program. Elite athletes almost invariably have agreements with their own sport governing bodies which, among other things, reiterate their acceptance of anti-doping policies and their participation in doping control.

At first blush, the obligations of those requiring, those conducting, and those submitting to doping control appear clear and well evidenced. However, the efficacy of the agreements providing for doping control depend on the capacity of the parties to make those agreements and the absence of factors which may vitiate the agreement.

The capacity to enter into an agreement that is legally enforceable depends on one’s age, one’s mental state, and in the case of a corporate or like entity (corporation, club, association, union) the requisite authority. Because many athletes are minors, the question of age in contractual capacity is of prime interest in doping control.48

1. Capacity and Age

At common law, minors do have the legal capacity to enter into binding agreements. For example, in Doyle v. White City Stadium Ltd.,49 the court held as valid a contract between an infant boxer and the British Boxing Board of Control, under which the infant received a license to box, enabling him to become proficient with a view to becoming a professional. As with the issue of medical consent to treatment, the common law has evolved a flexible test with respect to the age at which an individual has the legal competency to make a binding agreement.50 That test has much to do with the individual’s ability to understand the

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48. The following discussion raises many points that would have to be considered in the case of a mentally disabled athlete seeking to challenge doping control.
consequences of their own commitments and actions. The younger the child, the more reliance that will be placed on an individual's capacity.

Accordingly, if a minor has the capacity to understand and play according to the rules, the special requirements of anti-doping rules ought not to present a problem. Common sense suggests that if a minor has the concentration and dedication to train and compete at the elite level, he or she will have a more than adequate capacity to understand and form a binding agreement for drug testing.

But a minor could attempt to repudiate an agreement to be subject to doping control in the face of a request for a sample and claim that he or she did not fully understand what was being agreed to. Could that minor be sanctioned for such a refusal to be tested? Where a parent or guardian agrees on behalf of a minor, and the minor subsequently commits a doping infraction, should the consequences fall on the minor or the signatory? These are vexing questions for which there are no answers outside of the facts of a particular set of circumstances.

The matter is further complicated by the myriad of legislation which supplements or supplants the common law. In Canada, civil and property rights are a matter of provincial jurisdiction. In Ontario, the Age of Majority and Accountability Act establishes the age of eighteen as the entry to adulthood and the dividing line between one's "majority" and "minority." "Minors" do not enjoy all the same rights and privileges as adults under many Ontario laws. For example, Ontario human rights legislation only recognizes age discrimination starting at age eighteen. But Ontario has no legislation dealing explicitly with a minor's contractual rights. On the other hand, in British Columbia, section 16.2 of the Infants Act specifically provides that a contract is unenforceable against anyone under the age of nineteen except in specified circumstances.

It is impossible to predict how a challenge to doping control by a minor would be decided by a court. So much would depend on the circumstances, the jurisdiction and the individual minor.

51. Robert B. Kennedy has answered this question by writing, "I know of no authority under which a waiver signed by a parent or guardian on behalf of a child has been held enforceable against the child." Robert B. Kennedy, Assumption of Risk, Inherent Risk Acceptable and Release of Liability, in THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA, SPORTS AND THE LAW 11.15 (materials prepared for a CLE seminar held April 14, 1989, in Vancouver, B.C., Canada).
52. See § 92(13) of the Constitution Act, 1867, supra note 9.
53. R.S.B.C. 1979, c. 196.
2. Circumstances Vitiating the Agreement

Mistake, misrepresentation, duress, undue influence, unconscionability, or illegality, are all circumstances that may lead to negating an agreement or contractual obligation. In the context of doping control in the United States, duress has been raised to attack consent or agreement to be tested. On the other hand, in at least one Canadian case, consent to doping control prescribed by sport rules was held to be implicit in participating in the sport. However, there are no reported Canadian cases where doping control has been challenged due to circumstances vitiating an agreement.

Consistent with Recommendation 3(b) of the Dubin Report, the documents by which individuals join sport organizations, participate on provincial, national and international teams, and receive government funding increasingly make specific reference to anti-doping policies and rules and procedures for doping control. So long as participating in sport is viewed as a privilege, which by definition requires compliance with the anti-doping and other rules of sport, it will be difficult in Canada for an individual to argue that he or she was forced to agree to doping control, or unaware of his or her obligations. Even if the contractual basis for doping control is sound, an individual may have many means of attacking a positive test result or other finding that leads to a doping infraction.


Here, several athletes, representing the class, testified as to the circumstances under which each of them had signed the consent. That testimony revealed that, because of economic or other commitments the students made to the University, they were not faced with an unfettered choice in regard to signing the consent.

Hence, we find sufficient evidence for the trial court to conclude that the University failed to demonstrate that the students voluntarily without coercion signed the consent forms... Id. at 1035 (citing People v. Carlson, 677 P.2d 310 (1984).


56. "THAT those responsible for administering federal funds ensure

(b) that organizations in receipt of federal funding require as a condition of membership that athletes agree to comply with doping control rules, and make themselves available for testing in accordance with the organization's own requirements and those of the Sport Medicine Council of Canada;..." Supra note 1, at 527-528)
C. Procedural Challenges

Doping infractions are conceptually no different than other breaches of the rules of sport warranting discipline. There are numerous cases involving the discipline of athletes and other members by their sport organizations and the particular procedural requirements for that discipline to be valid. Sport organizations are not immune from judicial correction if they fail to follow their own rules or if they violate the rules of natural justice in dealings with individuals. Furthermore, the substantive sport rules themselves may be challenged as unreasonable. There is no reason to think that the Canadian Centre for Drug-free Sport's Standard Operating Procedures for Doping Control and subsequent challenges to determinations of infractions are not subject to like scrutiny. Indeed, both in Canada and other countries, procedural challenges to doping control have been the most frequent and successful type of challenge.

John Evans discusses what might appear to be an intrusion of public administrative law principles into relationships essentially governed by the agreement of individuals to abide by the private rules governing sport:

Whilst the legal relationships between members [of professional, trade or sporting associations and trade unions] are governed by contract, it is also the case that the monopolistic control over important areas of human activity exercised by many such associations endows them with many of the characteristics of governmental bodies. Thus, their rules are more akin to delegated legislation that unilaterally binds those to whom they are addressed, rather than to the terms of a contract that in any real-

57. See D. Ross Clark et al., The Rights of Amateur Athletes and the Obligations of Coaches and Others to Amateur Athletes, in SPORTS AND THE LAW, supra note 51, at 3.2.10-3.2.12 n. 16 (cites omitted).
58. See Kinnear v. Piper et al., (1978) 1 A.C.W.S. 573 (Ont. H.C.), (granting an injunction to prevent expulsion from a sport organization due to a failure to follow the organization's by-laws). See also Omaha v. B.C. Broomball Soc., (1981) 13 A.C.W.S (2d) 373 (B.C.S.C.) (issuing an injunction to prevent a suspension when there was no power to suspend in the sport organization's rules).
59. See Depiero v. Canadian Amateur Diving Assoc. Inc. et al., (1985) 32 A.C.W.S. (2d) 331 (Ont.H.C.), (quashing a decision of the sport organization's board to remove an athlete from a team due to failure to give notice and a conflict of interest in board membership). See BARNES, supra note 5, at 679, n. 287 (citing... St-Hilaire c. Assn. can. d'athlétisme, ([1990] A.Q. No. 42 (C.A.)), (coach successfully challenged a Commonwealth Games team selection process when the Court found that there was an arbitrary exclusion of a well-qualified candidate (the applicant St-Hilaire) and a failure to publicise the selection criteria in a timely fashion).
istic sense can be viewed as the product of bilateral negotiations and voluntary acceptance. Hence the courts have interpreted the rules of such bodies as not empowering them to expel members without first affording a fair opportunity to be heard. . . .

The procedural requirements for legitimate sport discipline cannot be specified exactly. They will depend on the nature of the infraction and its consequences. It has been suggested that Gray v. The Canadian Track and Field Association outlines the major elements that a sport organization ought to provide at a minimum: a notice of the infraction; an opportunity to be heard by the disciplinary body; and the adherence by the sport organization to its own rules. Barnes has suggested additional protections which would conform to the rules of natural justice which require the presumption of innocence and the affording of a fair opportunity to hear and rebut charges. In particular, he advocates that the "accused" must be given adequate notice and information about the case to be answered, and only those allegations of which he is informed can constitute reasons for the decision. The hearing must allow presentations from both sides, the deciding panel must be unbiased, having no potential for benefit in the event of a particular outcome, and there must be some opportunity for reconsideration or appeal. According to Barnes, basic principles of fairness must be observed, although it is not necessary to conform to all the procedures of a formal trial with legal representation and the application of the laws of evidence. Elsewhere, Barnes has also pointed out that one aspect of fairness is the speed of the disciplinary process. Because of the interests at stake, summary justice is inappropriate and decisions must not be taken with "indecent haste."

The Canadian Doping Control Standard Operating Procedures details the procedures for sample collection and sets out the requirement for laboratory analysis and reporting of results. It has its own mechanisms for challenging the sample collection and integrity of the sample custody and control. There is an internal review based on an athlete's written protest with a further hearing before an independent arbitrator. The athlete bears the burden of proof (on the civil standard of a balance of probabilities) to show some error or departure from the testing proce-

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62. CLARK, supra note 57, pp. 3.2.10-3.2.12, and the cases cited at note 16 of that article.
63. See BARNES, supra note 3, at 146-147.
64. BARNES, supra note 5, at 658.
65. Supra note 21, §§ 2.10.7 and 10.1.
66. Id. at § 10.2.
dures that is "substantial" and that impugns "the reliability of the test result." The decision of the arbitrator is final and binding.

The efficacy of procedural challenges to doping control is demonstrated by the record of such challenges in Canada. Of the four challenges to be fully arbitrated, three were decided in favor of the athlete challenging the doping control authorities' failure to follow their own procedures. In the fourth case, the challenge was unsuccessful because it was based on grounds not permitted by the Standard Operating Procedures for Doping Control: the technical validity of the testing methodology and results. Furthermore, it has been held that the failure to exhaust such internal remedies will result in dismissal of an application for prerogative relief quashing a positive test result.

Outside of Canada, challenges alleging failure to follow established doping control procedures have enjoyed mixed success. Notable recent cases involve German world champion sprinter Katrin Krabbe and

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67. Id. at § 10.2.12(v).
68. Id. at § Section 10.2.12(x).
70. In the Matter of Kevin Roy and Sport Medicine Council of Canada, Decision of an Independent Arbitrator, Jan. 1, 1990. Consistent with Canada's obligations under the Trilateral Agreement, the grounds for challenges accorded by the SOP are now unrestricted and include such technical challenges. See supra note 21, § 10.
72. Katrin Krabbe and two colleagues were subject to short notice or unannounced testing while training in South Africa, early in 1992. Lab analysis of the samples (conducted by the International Olympic Committee's Medical Commission accredited lab in Cologne, Germany) found the three samples to have come from the same person. However, irregularities in the sample collection procedure and in the methods and time taken to ship the samples from South Africa to Germany were found by the legal commission of the German Athletics Federation to raise serious doubts about the integrity of the samples. See In re Grit Breuer, Katrin Krabbe and Silke Moller, RA2/92 (Legal Committee of the German Track and Field Athletics Association) (on file with another). The test results were invalidated and the three athletes reinstated by their federation—in time for the Barcelona Olympics, where Krabbe would have been a favorite in the women's 100 and 200 meter sprints. However, the German Track and Field Athletics Association refused to accept the decision of its own Legal Committee. On May 31, 1992, the International Amateur Athletics Federation ("IAAF") announced that the dispute would be sent to the IAAF's Arbitration Panel. In mid-June, that body confirmed the decision to reinstate Krabbe and her colleagues. In the matter of an Arbitration concerning Grit Breuer, Katrin Krabbe and Silke Moller, IAAF Arbitration Panel, undated (on file with another). Krabbe subsequently tested positive for the banned substance clenbuteral and was suspended. See Krabbe Faces Long Drug Ban, GLOBE AND MAIL, Aug.
American 400 meter world record holder Butch Reynolds. In a less recent, but no less celebrated case, Swiss sprinter Sandra Gasser was unsuccessful in challenging doping control procedures both before an International Amateur Athletics Federation arbitration panel and the English courts.

D. Constitutional Challenges: Division of Powers and The Charter of Rights and Freedoms

The traditional form of Canadian constitutional challenge, that based on division of powers arguments, would seem unlikely in the context of doping control. Not only is the doping control conducted by the Canadian Centre for Drug-free Sport largely a creature of federal spending power within Parliament's authority, but it also enjoys the explicit recognition of the Canadian Policy Against Doping In Sport, which is the federal-provincial agreement specifically recognizing the Centre's role.


73. On October 4, 1991, a Doping Control Review Board convened by The Athletics Congress ("TAC") found that Reynolds had cast sufficient doubt on the validity of the drug test attributed to him. The Board found doubt about the integrity of the envopak zipper seals and about the drug testing and analysis conducted by the International Olympic Committee accredited Lafarge Laboratory in Paris. See In the Matter of Harry "Butch" Reynolds, Decision of the TAC Doping Control Review Panel, Oct. 4, 1991. Based on the Panel's decision, the TAC reinstated Reynolds for national competitions. However, the International Amateur Athletics Federation ("IAAF") refused to accept the Review Panel's decision and required the matter to be sent to an IAAF arbitration panel. That body upheld the suspension. In the Matter of Harry "Butch" Reynolds and TAC, Decision of the IAAF Arbitration Panel, May 13, 1992. However, Reynolds then secured orders from United States District Court (one of which led to an appeal through the United States Court of Appeal which the United States Supreme Court refused to hear) permitting him to compete in TAC sanctioned meets and, ultimately, the American Olympic Trials in early July. See Lisa B. Bingham, Arbitration of Disputes for the Olympic Games: A Procedure that Works, 47(4) ARBITRATION JOURNAL 33, 35-36 (1992). He failed to qualify for the American team except as an alternate. However, TAC and the United States Olympic Committee removed his name from the team roster and refused to take him to Barcelona. Reynolds continued to pursue a civil action against the IAAF and TAC in U.S. Federal Court. In December, 1992, U.S. District Court Judge Joseph Kinneary awarded Reynolds approximately $27.3 million in damages (including exemplary and punitive damages). See Reynolds v. International Amateur Athletic Federation, No. C-2-92-452, 1992 U.S. Dist. Lexis 8625 (S.D. Ohio June 19, 1992). By the summer of 1993, Reynolds attorneys were seeking to enforce the award by garnishing IAAF sponsorship money from American corporate sponsors. See James Christie, Amateur Notebook, GLOBE AND MAIL, July 15, 1993, at A11.

Furthermore, the national and international organization of sport and the requirements for consistent doping control procedures support action at a national level. However, constitutional challenges based on alleged violations of guaranteed rights are a newer and less tested possibility.

The *Canadian Charter of Rights and Freedoms* ("Charter") sets out the fundamental rights of Canadians, those with constitutional protection.75 Anyone whose Charter rights and freedoms have been infringed or denied may apply to the courts to obtain a remedy that "the court considers appropriate and just in the circumstances." [section 24(1).]

The rights and freedoms guaranteed by the Charter most obviously relevant to doping control are the "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" (section 7) and the "right to be secure against unreasonable search and seizure" (section 8). Both sections have been the basis for judicial decisions striking down as unconstitutional random drug testing of federal inmates conducted by the Correctional Service of Canada.76 However, arguments that section 7 rights are violated by doping control were rejected by the Independent Arbitrator hearing a challenge to a positive test.77 Furthermore, at least with respect to section 8 "search and seizures," it has been held that the Charter protection applies only where something has been taken by a public authority *without* consent.78 Doping control is consensual.

Section 15(1) sets out "equality rights." Every individual is equal before and under the law and has the right to equal benefit and protec-
tion of the law without discrimination, including discrimination based on a "mental or physical handicap."

However, the Charter has important limitations. For example, it applies only to government action.\(^7^9\) The acceptance of a contractual obligation can, in some cases, constitute the waiver of a Charter right.\(^8^0\) Furthermore, the rights and freedoms it protects are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." [section 1.] There is no explicit protection for property rights, including purely economic interests such as employment.\(^8^1\)

While it is clear that the Charter would apply to the actions of Sport Canada, its application to doping control conducted by the Canadian Centre for Drug-free Sport is uncertain.\(^8^2\) Two earlier sport related decisions have suggested that sport organizations are not subject to the Charter even if they receive the bulk of their funding from govern-

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79. One of the consequences is that government action authorized by legislation that breaches the Charter may lead to the legislation itself being struck down as unconstitutional. As a companion constitutional provision sets out, the Constitution of Canada is the supreme law of the country and inconsistent laws have no force and effect: Constitution Act, 1982, supra note 75, at § 52(1).


81. In the absence of a specific guarantee of property rights, various sections of the Charter have been invoked to afford such protection, especially section 7. However, the Courts have, by and large, rejected Charter challenges to restrictions on employment claiming a violation of the right to "life, liberty and the security of the person." See Charboneau v. College of Physicians and Surgeons, (1985) 52 O.R. (2d) 552 (H.C.J.); Wilson v. Medical Services Commission, (1988) 30 B.C.L.R. (2d) 1 (B.C.C.A.), leave to appeal refused (S.C.C., November 3, 1988); and Bennett v. British Columbia (Securities Commission), (1991) 82 D.L.R. (4th) 129 (B.C.S.C.), overruled on other grounds.

82. In Barnes' view, and in spite of successful constitutional challenges in other contexts, application of the Charter to doping control is "problematic." However, after reviewing a small portion of the enormous body of American jurisprudence challenging doping control on constitutional grounds, he concludes that government-sponsored drug testing may be susceptible to constitutional challenge in spite of athletes' "apparent 'consent' to the required working conditions." Barnes, supra note 3, pp. 51-53 and Barnes, supra note 5, pp. 655-658. However, Barnes offers no real rationale why this corpus of American Fourth Amendment constitutional jurisprudence might apply in Canada. In R. v. Keegstra, [1990] 3 S.C.R. 697, 823, Madame Justice McLachlin reiterates a caution about applying American constitutional tests in Canadian law even when there are analogous constitutional provisions. In R. v. Broyles, [1991] 3 S.C.R. 595, 610, a case involving section 7 and an accused's right to silence, Mr. Justice Iacobucci made passing reference to recent American constitutional jurisprudence on the Fifth and Sixth Amendments, but continued that Canadian courts should not hesitate to develop a uniquely Canadian approach to the issue, in keeping with the overall goals of the Charter. Furthermore, Barnes' views would appear to be predicated on a characterization of athletes as employees which, as discussed above, is itself arguable.
ments.83 On the other hand, in the first challenge to a positive test pursuant to the Canadian Standard Operating Procedures for Doping Control, the Independent Adjudicator agreed with the athlete’s contention that doping control did fall within the purview of the Charter. He concluded that doping control flowing from Sport Canada’s 1985 Policy and conducted by the Sport Medicine Council of Canada at the behest of Sport Canada, and Sport Canada’s influence through funding of sport governing bodies, “all bespeak government action.”84

Subsequently, the courts have developed a number of interrelated tests for application of the Charter because the actor is part of the government, or the impugned action is sufficiently “governmental.” Accordingly, the University of Guelph is essentially autonomous and not sufficiently governmental even though created by statute, largely funded by government, and performing a public service.85 On the other hand, Douglas College, a community college in British Columbia, is a government agency because it was established to implement government policy, funded by government, subject to government legal direction, and controlled by a board of governors appointed (and removable) by government.86 In a 1988 article on drug testing in sport, Jeff Trosman noted the same sort of factors in arguing that a sport supervisory body created by statute (he uses the example of the Ontario Racing Commission) would likely be subject to the Charter.87 Assuming the Charter does apply, query whether an athlete’s consent to doping control does not preclude a subsequent challenge based on Charter rights.

If testing were found to violate an enumerated Charter right—notwithstanding prior consent—the requirement for testing in sport might well be a “reasonable limit” on guaranteed rights that could be “demonstrably justified in a free and democratic society” pursuant to section 1.88 The work and report of the Dubin Inquiry, and similar in-

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84. In the Matter of Glenn Dodds and the Sport Medicine Council of Canada, supra note 69, at 7.
85. McKinney v. University of Guelph, supra note 80.
87. Trosman, supra note 76, at 199. The Ontario Racing Commission, the regulating body of horse racing and wagering, is continued by section 2 of the Racing Commission Act, R.S.O. 1980, c. 429.
88. At least in a section 7 case. Because the section 8 search and seizure provision contains its own “reasonable” standard, it is difficult to see how a law impugned under that provision could be saved by section 1, thereby being “reasonably unreasonable”. However, this means that in section 8 case, the balancing inherent in the reasonable test will occur while
queries in Australia, Great Britain, Germany, and the United States, appear to have more than documented the nature and extent of the problems for which doping control is a crucial and internationally supported response.89

However, it appears that the section 1 justification would not be available in the case of the Canadian Centre for Drug-free Sport. Canadian doping control is not provided for by legislation and, therefore, not “prescribed by law” for the purposes of section 1. While the Supreme Court of Canada has held that a limit prescribed by law within the meaning of Section 1 may result by implication from the terms of a legislative requirement or its operating requirements,90 and may be found in statutory law or regulations, or even the common law,91 rules and guidelines otherwise constituted are not sufficient.92

E. Privacy Legislation

The Privacy Act93 provides individuals with access to their personal information held by the federal government. It limits those who may see the information. It also gives individuals some control over the government’s collection and use of the information. The Act also creates the Office of the Privacy Commissioner. The Privacy Commissioner may consider complaints from individuals if a government institution is collecting, keeping, using, or disposing of personal information contrary to the Act.

applying the substantive right, and not in the context of the section 1 saving provision once a substantive right (such as a section 7 right) has been found violated.


92. Ontario Film and Video Appreciation Society v. Ontario Board of Censors, supra note 92 (mere guidelines established by an administrative tribunal for the exercise of its power to censor films have no legal status); Weatherall and others v. Canada (A.G.) (1987) 59 C.R. (3d) 247 (F.C.T.D.); appeal allowed in part [1989] 1 F.C. 18 (C.A.) (directives issued by the Commissioner of Penitentiaries cannot be regarded as “law” within the meaning of section 1: they are designed for the internal management of prison institutions and give rise to disciplinary action but create no legal rights or obligations).

The Office of the Privacy Commissioner has expressed concern about doping control. In his 1988-89 annual report to Parliament, Privacy Commissioner John Grace opined that mandatory, unannounced random testing “appears to ignore a concept which is fundamental to individual privacy—the presumption of innocence” guaranteed by the Charter.

In 1990, the Privacy Commissioner issued a report entitled Drug Testing and Privacy. Central to the report is the thesis that the results of drug testing are “personal information” as defined by the Act. The report’s basic position is that drug testing is “extremely intrusive” of an individual’s right to privacy, especially when imposed randomly and without “reasonable suspicion” safeguards. The report recommended that government institutions should seek Parliamentary authority before collecting personal information through mandatory drug testing. The report sets out circumstances in which drug testing should be conducted including: reasonable grounds to believe that there is a significant prevalence of drug use or impairment within the group; the drug use or impairment poses a substantial threat to the safety of the public or other members of the group; the behaviour of the individuals in the group cannot otherwise be adequately supervised; there are reasonable grounds to believe that drug testing can significantly reduce the risk to safety; and no practical, less intrusive alternative, such as regular medical examinations, education, counselling, or some combination of these, would significantly reduce the risk to safety. Drug Testing and Privacy is particularly critical of mandatory, unannounced random testing of federally funded athletes. It suggests that such testing is contrary to sections 7 and 8 of the Charter, and could not be justified under section 1 according to the tests set out in recommendation 2 (given above). It also suggests that such testing would be contrary to the Privacy Act itself.

However, the Privacy Commissioner’s comments may not be well founded. First, because drug testing of athletes has never been conducted directly by Sport Canada or some other government agency, it is

94. Dubin Report, supra note 1, at 492. Dubin dismissed the Privacy Commissioner’s views: “With the greatest respect, the issue of random testing does not engage the provision of the Charter of Rights and Freedoms concerning the presumption of innocence…. The right to presumption of innocence has no application to issues of drug testing in sport.” Id. at 492-93.

95. Drug Testing and Privacy, supra note 41, at 1.

96. See id. at 24-25, Recommendations 2 and 3.

97. See id. at 43-44.
doubtful that the *Privacy Act* even applies.\textsuperscript{98} As the Privacy Commissioner's most recent annual report notes, because the Canadian Centre for Drug-free Sport is not a federal agency, it is not subject to the Act.\textsuperscript{99} Second, the Privacy Commissioner's Charter analysis appears predicated on the assumption that receipt of federal funding constitutes athletes as federal employees.\textsuperscript{100}

Most fundamentally, the Privacy Commissioner overlooks the consensual nature of doping control; it is not imposed externally but demanded by those most directly affected. As Dubin noted, the most vigorous opponents of cheating in sport through use of banned substances and practices are athletes and coaches. He concluded that they represent the vast majority of Canadian coaches and athletes.\textsuperscript{101}

\textbf{F. Human Rights Legislation: The Canadian Human Rights Act}

In addition to the rights of the individual protected by the Charter from government action, human rights legislation prohibits improper discrimination in the provision of services and employment, public or private sector.\textsuperscript{102} Reflecting the somewhat uneasy constitutional posi-

\textsuperscript{98} See id. at 43, (noting that a drug testing program would “if conducted by Sport Canada” be a violation of the *Privacy Act*”).

\textsuperscript{99} OFFICE OF THE PRIVACY COMMISSIONER, ANNUAL REPORT—PRIVACY COMMISSIONER—1990-1991 (1991). The Privacy Commissioner goes on to speculate that the creation of the Canadian Centre for Drug-free Sport outside government “may have been a deliberate attempt to circumvent the [Privacy] Act.” Id.

\textsuperscript{100} “It was both surprising and disappointing to note that the government’s position—as expressed to Dubin by senior officials of Sport Canada—was that federally-funded athletes should be subjected to random, mandatory and unannounced urinalysis for banned substances. . . . This position was surprising because of the government policy of rejecting drug testing in the employment setting except in circumstances where there are overriding public safety concerns. . . . Charter rights also apply to federally-funded athletes. Like other employees, these athletes receive monthly cheques from the government for their efforts.” (DRUG TESTING AND PRIVACY, supra note 41, at 43).

\textsuperscript{101} Dubin Report, supra note 1, at 488. Note that Dubin devotes an entire chapter of his report to detail some of the evidence he heard from athletes on this subject: chapter 23, Athletes and Coaches Against Drugs. He reiterates the point in stating at pages 520-521: “Indeed, the strongest opponents of drugs and cheating are the athletes and coaches who do not engage in such practices but whose own reputations have been blemished by the doubt cast upon all athletes and coaches by the conduct of those who do cheat.” Id. at 520-21.

\textsuperscript{102} Not all differentiation is discriminatory. Discrimination is adverse differentiation, where the impugned distinction relates to personal characteristics of an individual (such as age, sex or disability) and where it has the effect of imposing obligations or burdens not imposed on others or limiting opportunities not limited to others: Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, 174 (paraphrasing McIntyre, J).
tion of federal government mandated doping control, a challenge might be based on either federal or provincial human rights law.\textsuperscript{103}

The \textit{Canadian Human Rights Act}\textsuperscript{104} applies to matters coming within the legislative authority of Parliament. [Section 2]. The requirement of sufficient federal government nexus, for application of the Act, is likely the same as for application of the Charter. Section 3(1) of the Act proscribes discrimination on, among other grounds, “disability,” which is specifically defined in section 25 to include a “previous or existing dependence on alcohol or a drug.” The Canadian Human Rights Commission’s (non-binding) policy on drug testing takes a rather broad view of “dependence” (which is not defined in the Act). It states that the Commission will receive complaints alleging discrimination based on disability, including “drug dependence,” “perceived drug dependence,” and “other disability” revealed by drug testing.\textsuperscript{105} “Discriminatory practices” include denying “the provision of goods, services, facilities, or accommodation generally available to the general public” or “to differentiate adversely in relation to an individual” on a proscribed ground of discrimination. [Section 5]. It is also a “discriminatory practice” to refuse employment or to differentiate adversely in relation to an employee on a proscribed ground of discrimination.

Exceptions are set out in Section 15. For example, it is not a discriminatory practice to differentiate in relation to employment based on a “\textit{bona fide} occupational requirement” [Section 15(a)] or in the provision of goods, services, facilities, or accommodation if “there is a \textit{bona fide} justification” for that differentiation [Section 15(g)].

If the Act applies to the drug testing of athletes, and an athlete can demonstrate a “disability” relating to drug use (in the Canadian Human Rights Commission’s eyes, a dependence or perceived dependence on a performance enhancing substance), and some action based on that disability is taken contrary to the athlete’s interests—such as withdrawal of

\textsuperscript{103} The \textit{Dubin Report} discounted the possibility that doping control was contrary to Canadian human rights legislation by stating:

“human rights legislation enacted by the Province of Ontario has been held to apply to private sport organizations. Similarly, legislation in other provinces may well have the same application. These statutes set out enumerated grounds of discrimination. To require all athletes within a sport federation to agree to random testing as a condition for eligibility could not, in my opinion, be viewed as discriminatory.” \textit{Supra} note 1, at 494.

However, the \textit{Dubin Report} contains no analysis to substantiate this conclusion.

\textsuperscript{104} R.S.C. 1985, c. H-6, § 2.

\textsuperscript{105} Policy 88-1, January, 1988. It should be noted that this policy does not distinguish between dependency on legal and illicit drugs.
eligibility for federal funding—it may be that the Act has been con- 
tra-vened. However, dependency on a performance enhancing drug con- 
tituting a “disability” is far from a clear equation. The Commission’s 
policies are not determinative and do not have the force of law. Fur- 
thermore, it is not obvious that federal funding or other support is a “good, 
service, facility, or accommodation customarily available to the general 
public.” By definition, high performance or elite sport athletes are 
extraordinary and quite distinct from society and the public at large. Of 
course, the employment-related proscriptions will only apply to athletes 
if receipt of federal funding constitutes employment.

But these questions may never even be reached. It is arguable that 
the Act does not apply to drug testing conducted by an independent 
agency at arms-length—especially in view of the jurisdictional uncertain- 
ties discussed above.

However, these hurdles must be seen in light of the jurisprudence 
relating to human rights legislation which seeks to give it liberal and ex- 
pansive application. To take a recent example, in Rosin v. Canada\textsuperscript{106}, 
the Federal Court of Appeal considered whether a specialist military 
parachuting course offered by the Canadian Armed Forces to its mem- 
ers was a service or facility customarily available to the general public 
pursuant to the federal Act. In upholding a Human Rights Tribunal rul- 
ing that it was, the Court noted:

In the interpretation of human rights codes, the Canadian courts 
have consistently accorded them a meaning which will advance 
their broad purposes. Our courts view human rights codes not as 
ordinary statutes, but as special, as fundamental, as “almost con- 
stitutional” in nature. For example, Mr. Justice Lamer, as he then 
was, declared a human rights code “is not to be treated as another 
ordinary law of general application. It should be recognized for 
what it is, a fundamental law.”\textsuperscript{107}

The Court goes on to cite Chief Justice Dickson that human rights 
legislation must be given “a fair, large, and liberal interpretation as will 
best ensure their objects are attained” and that the courts “should not 
search for ways and means to minimize those rights and to enfeeble their 
proper impact.”\textsuperscript{108} In this prevailing climate, it would be imprudent to 
totally discount the possibility that a human rights complaint alleging


\textsuperscript{107} Rosin, 1 F.C. at 397 (citing Insurance Corp. of B.C. v. Heerspink, [1982] 2 S.C.R. 145, 

\textsuperscript{108} Rosin, 1 F.C. at 398 (citing Canadian National Railway Co. v. Canada (Canadian 
discrimination due to disability that is related to banned substances could not be successful.109

Regardless of the jurisdiction, human rights commissions take a dim view of drug testing in any strict non-medical setting. For example, in January, 1988, the Canadian Human Rights Commission went on record as being against the use of test results, or using refusal to be tested, as a basis for differential treatment of an employee or potential employee, even though it acknowledged that the Canadian Human Rights Act does not specifically prohibit drug testing.110


Federal jurisdiction over sport is sufficiently uncertain in that the application of federal human rights legislation is not assured in the field of drug testing (assuming it applies at all). Because the Canadian Centre for Drug-free Sport has its head office in Ontario, any challenge to doping control based on provincial human rights legislation is most likely to be made pursuant to the Ontario Human Rights Code111 ("Code").

The Ontario Code is similar to the federal legislation although it refers to "handicap" and not "disability" as a prohibited ground of discrimination. [Part I, "Freedom from Discrimination"]. Section 1 provides that every person has the right to equal treatment with respect

109. The Task Force Report states that the federal government’s Fitness and Amateur Sport Branch ought to expect the organizations it funds to meet the "values" of what it describes as the Charter of Human Rights of Canadians. See supra note 14, at 141, Recommendation 57. The Report may be referring to the Charter, to the Canadian Human Rights Act or to both. Regardless, this is another indication of the public policy if not legal trend to expanding the ambit of such protections for individual rights.

110. Policy 88-1, supra note 106.

111. S.O. 1990, c. H-19. Barnes notes the case of a 16-year-old girl from Denmark prevented from playing in the boys division of an international soccer tournament sanctioned by the Canadian Soccer Association and held in Ontario. A Human Rights Tribunal considering a complaint under the federal Act held that the national sport governing body’s involvement in the exclusion did not have the character of an inter-provincial undertaking or national concern, and did not qualify as a commercial or corporate activity such that the federal law applied. Any remedy would have to be sought under provincial legislation. Barnes, supra note 3, at 67, (citing Wood v. Canadian Soccer Association, (1984) 5 CH.R.R. D/2024 (Human Rights Tribunal, Jan. 12, 1984)). In a more recent case, the Supreme Court of Canada dismissed an appeal from the Ontario Court of Appeal decision holding that the National Dental Examination Board of Canada was subject to the Ontario Human Rights Code. The Supreme Court held that the Board was not operating under the Peace, Order and Good Government clause or the Trade and Commerce power under section 91 of the Constitution Act, 1867 and that simple federal incorporation was not sufficient to oust the jurisdiction of the provincial human rights commission and law. Ontario (Human Rights Commission) v. National Dental Examining Board of Canada, [1991] 3 S.C.R. 121, 122.
to services, goods and facilities without discrimination because of handicap. Section 5 gives the same freedom with respect to employment. "Because of handicap" is defined in section 10(1) to include having or being believed to have any degree of physical disability or infirmity, or a condition of mental impairment, or other specified conditions. Section 11 proscribes "constructive discrimination" when a "requirement, qualification or consideration," although not itself discrimination on a prohibited ground, would nonetheless result in the "exclusion, qualification or preference of a group of persons identified by a prohibited ground of discrimination." However, there is an exception when the "requirement, qualification or consideration" is "a reasonable and bona fide one in the circumstances." Furthermore, a right is not infringed if a person is incapable of performing or fulfilling "the essential duties or requirements attending the exercise of the right" because of a handicap.

However, it is arguable whether use of or dependency on a performance enhancing substance or practice could be characterized as a "handicap" under section 10(1). One would think that use of banned substances or practices is a real advantage, not a disadvantage or handicap; otherwise the substances and practices would not be banned.

The Ontario Courts have held that the Code imposes on those who offer services in the field of sport the obligation of making accommodation to the needs of handicapped persons who may wish to participate, up to the point of undue hardship—to the sport. The Youth Bowling

112. S.O. 1990, c. H-19, § 11(1)(a). Section 11(2) goes on to place an onus on the party alleged to be discriminating to demonstrate that the needs of the group to which a complainant is a member cannot be accommodated without undue hardship, considering relevant costs and health and safety requirements.

113. Again, there is an onus to demonstrate the inability to accommodate as worded in section 11(2): S.O. 1990, c. H-19, § 17(2).

114. (1991) 75 O.R.(2d) 451 (Div.Ct.). Cases dealing with pre-1981 provisions of the Code concerning access to "public facilities" had held that amateur sport organizations were not subject to the Code. See, e.g., Cummings and Ontario Minor Hockey Association (1978) 7 R.F.L.(2d) 359 (Ont. Div. Ct.), affirmed (1979) 10 R.F.L.(2d) 121 (Ont. C.A.); and Ontario Human Rights Commission and Bannerman v. Ontario Rural Softball Association (1979) 10 R.F.L.(2d) 97 (Ont. H.C.). However, in Re Blainey and Ontario Hockey Association (1986) 54 O.R.(2d) 513 (C.A.), a provision of the Code excepting discrimination on the basis of gender by sports organizations was struck down as contrary to the Charter of Rights and Freedom. While the Ontario legislation gives an exemption from the provisions of the Code to "recreational clubs," that exemption is limited to the prohibited grounds of discrimination of age, sex, marital, or family status. See § 20(3). The applicability of human rights legislation to sport bodies must be examined on a province-by-province basis, and depending on the circumstances. For example, in Nova Scotia, Beattie v. Acadia University (1976) 72 D.L.R.(3rd) 718 (N.S.C.A.), held that access to intercollegiate sport is not protected by provincial human rights legislation; however, the legislation did apply to house league hockey and was used to uphold
Council case involved a young physically handicapped bowler who could not compete without the assistance of a ramp to launch the bowling ball down the alley. The provincial sport governing body excluded her from competing in a tournament. She complained to the Ontario Human Rights Commission of discrimination on the basis of physical handicap. The Commission substantiated the complaint and ordered it be considered by a board of inquiry. The board agreed with the complaint and ordered the provincial sport governing body to permit the competitor to participate in tournaments with the ramp. The Youth Bowling Council appealed.

The Divisional Court held undue hardship to sport to be reached when the proposed accommodation would impact significantly upon the way in which other participants would be required to play or would give the accommodated person an actual advantage over others in such participation. On the evidence before it, the Court was not willing to conclude that use of the ramp was advantageous compared to the deliveries of the other bowlers. They were able to impart spin on their bowling balls and vary the velocity of delivery, two aspects of the act of bowling that the ramp virtually precluded. Furthermore, the evidence established that use of such ramps was not unique to the competitor in question or to Ontario. So, in the terms of sections 10 and 16 of the Code, the Court found the prohibition against using the ramp in competition not to be reasonable or bona fide in the circumstances (section 10(a)) and found the competitor able to perform or fulfill the essential requirements of the activity notwithstanding the handicap.

The Youth Bowling Council case indicates that it may be easier than it would appear to meet the initial hurdle of applying the Code to competitive sport. Nevertheless, even if a competitor could then characterize use of or dependence on a banned substance or practice a “handicap” for the purposes of the Code, there would appear to be ample evidence to support the requirement for avoiding banned substances and practices, and for doping control, as “reasonable and bona fide... in the circumstances.” However, the Youth Bowling Council case might well encourage complaints to the Ontario Human Rights Commission. Given the antipathy to drug testing of any kind displayed by human rights commissions, complaints could well lead to at least board of inquiry proceedings under the Code.

a complaint by an eleven year old girl denied registration by a (boys’) hockey association. Forbes v. Yarmouth Minor Hockey Association (Nova Scotia Board of Inquiry, October 27, 1978) unreported decision referred to in BARNES, supra note 3, at 76.
An action seeking damages or some other relief connected to doping control is unlikely to occur without some other successful challenge. If an athlete was successful in a procedural challenge to a positive test result, but missed a critical competition while the challenge proceeded, he or she could well claim for damages, citing as negligence whatever problem sustained the challenge. The action would likely name at least the Canadian Centre for Drug-free Sport, the certified doping control officer who conducted the sample collection, the sport governing body, and Her Majesty the Queen in right of Canada (as represented by Sport Canada) as the sanctioning bodies, and depending on the circumstances, the testing laboratory.

The usual principles of tort law would apply. The plaintiff would bear the burden of demonstrating on a balance of probabilities that the Centre, the laboratory, or other relevant organizations or individuals, owed him or her the requisite duty of care; that the problem was indeed negligence and not some mistake of a lesser order; that the negligent act breached the duty of care; that the consequences suffered by the plaintiff as a result of that breach were reasonably foreseeable; that damages were suffered by the plaintiff; and that the damages were sufficiently connected to those consequences that the Centre and others ought to be held responsible. The consequences could include loss of the opportunity to compete, loss of reputation, and loss of federal funding, commercial endorsements, appearance money, or other sport-related income.

It would be hard to characterize the Centre and its certified doping control officers as not having a legal duty of care toward those subject to doping control. It seems that the most difficult part of the plaintiff's case would be to establish that the misdeed during doping control constituted a negligent act, and to demonstrate the consequences; and, therefore, damages attributable to that negligence. Nonetheless, at a time when elite sport becomes increasingly a full-time activity, and with commercial possibilities flowing from athletic performance in an ever wider array of events and sports, the adverse consequences to individuals of problematic doping control are more likely to give rise to successful claims for monetary compensation.

No such challenges have been pursued in Canada since the initiation of doping control, despite arbitral decisions overturning positive test results for failure to adhere to the requirements of the Doping Control Standard Operating Procedures.
IV. OTHER LEGAL UNCERTAINTIES

Doping control in Canada has become increasingly subject to legal pressures. Those pressures can be expected to increase as litigants explore public law recourse. Furthermore, changes to testing protocols will also generate legal issues. The Australian situation—with a Canadian twist—illustrates certain perils of doping control becoming less and less the responsibility of sports administrators and more and more that of lawyers and law-makers.

A. Legislating for Doping Control

The Australian counterpart of the Canadian Centre for Drug-free Sport is the Australian Sports Drug Agency ("ASDA"). ASDA was created by an act of the Commonwealth Parliament, the Australian Sports Drug Agency Act 1990 ("ASDA Act"). The ASDA is responsible for drug testing, the development and implementation of education and research policies and programs, and promoting the adoption of uniform drug testing policies and approaches to drugs in sport both in Australia and internationally. The ASDA is specifically authorized to perform its functions within or outside Australia. The ASDA receives its funding directly from the Commonwealth Parliament. The Commonwealth Department of the Arts, Sport, the Environment, Tourism and Territories is responsible for the legislation. Doping control procedures are prescribed by regulation in the Australian Sports Drug Agency Regulations.

The other key player in Australian anti-doping is the Australian Sports Commission ("ASC"). It too was established by legislation: the

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116. The "objects" of the ASDA are set out in section 8 of the Act and include encouraging "the practice of sport free from the use of drugs, in a manner consistent with the objectives of protecting . . . the health of competitors . . . the values of fair play and competition and the rights of those who take part in sport." Section 8(d) calls for the "establishment of a centralized drug sampling and testing program that exposes all competitors to sampling and drug testing, at short notice, at sporting events, during training and at any other time." Section 8 also encourages the "development and maintenance of drug testing laboratories accredited by the International Olympic Committee" and promotes the "adoption, at an international level, of uniform sampling and drug testing procedures, and of educational programs relating to the use of drugs in sport."
117. ASDA Act, § 9(4).
118. ASDA Act, Part 7.
Australian Sports Commission Act 1989. The ASC is responsible for the development and coordination of anti-doping policies for national sport organizations through its funding links with them. The ASC has developed a Doping Policy which specifies the obligations of sport organizations in testing athletes, hearing cases where a breach of its policy is alleged to have occurred, determining penalties, and reviewing sanctions. The policy also requires sport organizations to use ASDA to conduct doping control and to support the ASDA's education and information initiatives. Adherence to the ASC Doping Policy, or development of a policy consistent with it, is a condition of ASC financial assistance.

There was a serious challenge to this impressive legal edifice. In May, 1991, the then Sport Medicine Council of Canada tested Martin Vinnicombe, an Australian cyclist competing in the United States. Vinnicombe tested positive. However, he is challenging the sample collection procedure as inconsistent with and contrary to that conducted by the ASDA.

The Canadian testing of Mr. Vinnicombe was in response to an ASDA request to the Council dated May 20, 1991, and pursuant to an ASDA “Letter of Authorization for Out of Competition Drug Testing” dated May 22, 1991. The sample was taken on May 25, 1991. At that time, Vinnicombe signed the Council’s applicable Doping Control Form in which he declared that he was satisfied with the manner in which the sample-taking procedure was carried out. The “A” and “B” samples were sent to the International Olympic Committee accredited Laboratory in Montreal for analysis. On May 30, 1991, the laboratory found the “A” sample to contain stanozolol, a banned anabolic steroid. The “B” sample was analyzed on June 11, 1991, and confirmed the finding of stanozolol. That information was relayed to the ASDA. Vinnicombe was informed of the positive test result on June 15, 1991, in Australia. Consistent with the rules of his national and international sport federations, Vinnicombe received a two-year suspension, effectively denying him participation in the next Olympic Games.

Vinnicombe never denied that he had in fact used stanozolol. On the contrary, he commenced legal proceedings in the Federal Court of
Australia challenging the ASDA’s reliance on the Sport Medicine Council of Canada’s conduct of doping control. He claimed that the test results ought to be invalidated because of the variations between doping control as set out in the ASDA Act and ASDA Regulations and as set out in the Canadian Doping Control Standard Operating Procedures.

On March 18, 1992, Judge Morling of the Federal Court suggested that there be mediation between the ASDA, ASC, Vinnicombe and the national amateur and professional cycling federations. R.J. Ellicott, a former Commonwealth Minister responsible for sport was appointed as the Referee. As a result of disagreements about the scope of the mediation, the ASDA withdrew. Ellicott ultimately found that, although it was clear that Vinnicombe had taken steroids, the sanctions imposed on him were invalid because the strict ASDA procedures for doping control had not been followed.\textsuperscript{124} Vinnicombe’s proceeding against the ASDA remained outstanding because of the ASDA’s refusal to participate in the mediation or abide by the mediator’s conclusions.

As a direct response to Vinnicombe’s challenge, the ASDA Act was amended.\textsuperscript{125} Among other things, the amendments enabled the ASDA to recognize procedures adopted by foreign anti-doping authorities testing on its behalf, even if those procedures do not precisely follow those set out in the ASDA Regulations. The minimum standard for recognized doping control procedures will be those provided for in the International Olympic Charter Against Doping in Sport.

The fact that the legislation was introduced prior to resolution of the Vinnicombe legal action is recognition of a certain rigidity in the ASDA Act and its Regulations. It also illustrates the risks of a fully legislative scheme for doping control with the attendant difficulties and inconvenience of amending legislation whenever changes are desired or dictated by legal challenges, successful or otherwise. Ironically, Vinnicombe withdrew his proceeding against the ASDA on the eve of the trial.\textsuperscript{126}


\textsuperscript{125} See Vin- nichome in the clear as ban is lifted, THE SYDNEY MORNING HERALD, April 25, 1990, at 64.

\textsuperscript{126} Meeting with Trish Kavanagh, counsel for the ASDA, in Ottawa, Canada, (June 29, 1993).
B. International Harmonization

The demise of Vinnicombe's challenge to the ASDA's reliance on the doping control procedures of its Canadian counterpart lifted a cloud from implementation of the Trilateral Agreement. However, the case raises the specter that participating doping control authorities might have to adopt the particular procedures and paperwork of the athlete's home jurisdiction for doping control conducted out-of-jurisdiction. This would compound the possibility of procedural errors compromising the requisite integrity of at least sample collection.

This sort of possibility is one factor that is leading national doping control authorities to further harmonize doping control procedures. Perhaps this will ultimately result in a common procedure and common documentation for use world-wide. Such international standardization can only be helpful in the long run. Furthermore, the apparent failure of international sport organizations to take matters in hand leaves a vacuum that invites occupation by government-sponsored bodies such as the Canadian Centre for Drug-free Sport and the Australian Sports Drug Agency.

But international standardization has its own legal difficulties. The variations in and vagaries of domestic law will make it difficult to homogenize the legal protections and procedures that are properly part of doping control. In late 1990, a Doping Control Review Panel of The Athletics Congress in the United States was constituted to hear a challenge to a positive test by shotputter Randy Barnes. While the Panel upheld the positive test and resultant suspension, it was clearly uncomfortable with the legal tests it had to apply pursuant to the sport federation rules governing the challenge which it found out-of-step with American law. On the other hand, the Panel implicitly recognizes the
value of and need for universal rules of sport (including those for doping control) which govern participants regardless of nationality.

C. Blood Testing

Doping control by means of urine sampling will be augmented by blood testing by the time of the 1994 Winter Games. Cross country skiers have been subject to blood testing conducted by the Fédération Internationale de Ski at international competitions since 1989. In August, 1993, the International Amateur Athletic Federation amended its doping control procedural guidelines to provide for the collection of blood samples. The invasive nature of taking a blood sample, as opposed to passing a urine sample, is bound to heighten the legal concerns surrounding doping control. What is certain is that the issues raised by doping control are legally dynamic and show no signs of early or easy resolution.

V. Conclusions

So why do men and women take these risks [of using steroids and other banned drugs]? A candid answer was given by Canadian sprinter and colleague of Ben Johnson, Tony Sharpe: "The glory is too sweet, the dollars too much."

In the Matter of Randy Barnes, Decision of the TAC Doping Control Review Panel, Jan. 4, 1991, at 17 (cite omitted).


130. PROCEDURAL GUIDELINES FOR DOPING CONTROL, § 5 (Aug. 1993) (giving guidelines for both doping control during competition and out of competition testing).

131. See, e.g., Joseph de Pencier, Blood Analysis and Doping Control—Legal, Social and Organizational Issues, (paper presented to the Second International Symposium on Drugs in Sport, Lillehammer, Norway, August 29, 1993). In his 1992-1993 Annual Report, the Privacy Commissioner of Canada expresses the same concern: "It is frightening to think that some people will contemplate violating the very physical integrity of human beings, an integrity protected for centuries by law, in the name of men and women playing games." Id. at 35 (on file with author). The Canadian Center for Drug-free Sport is taking a wait-and-see attitude at present (December, 1993) pending reports from the International Amateur Athletics Federation and the Lillehammer Olympic Games organizers, as well as its own research. See Canadian Center for Drug-free Sport, Position Paper on Blood Sampling (October, 1993) (on file with author).
The glory and the dollars have been too much for the administrators as well as for the athletes. As "amateur" sport began to attract new money from TV and sponsorship, it was not only the athletes who benefited. The federations grew in prestige and wealth. It could all be lost if the public discovered that many of their heroes were pumped up with illicit drugs. These fears created a culture of blindness. Sports officials who should have been rooting out doping looked the other way. Worse still, they then began to protect their stars from exposure.\textsuperscript{152}

In Canada, anti-doping matters are hardly under the control of sport governing bodies. In the wake of the Dubin Inquiry and given the history of government involvement in doping control, is it any surprise? Some say this is a result of sport governing bodies abdicating their responsibilities to ensure fair competition. The full effects of this lack of control are not complete. They remain to be seen, especially as the Canadian Centre for Drug-free Sport consolidates responsibilities for all aspects of doping control, from testing procedures to legal mechanisms for review.

However, it also remains to be seen if the independent testers and the lawyers who are replacing sport officials as the main actors in anti-doping matters will have any more success than their predecessors in eradicating the abuse of drugs by some athletes and their entourages. Troubling is the fact that with lawyers comes the encouragement and the means for challenging doping control. The "glory" and the "dollars" have seen to that. The legal aspects are becoming the focus of doping control, at the expense of deterring and catching cheaters. Ironically, it appears that parallel to the loss of control over anti-doping by sport bodies, ensuring fair competition is becoming less of a concern than protecting the rights of individuals accused of doping. The result may be exactly the ethical and moral erosion in sport Mr. Justice Dubin and others fear. The possibility accentuates the need to ensure a balance in doping control between the collective need for effective testing and the individual need for fair procedures. The possibility also emphasizes the absolute requirement that both testing and legal procedures be designed and administered with the fundamental purpose of doping control in mind: ensuring the integrity of athletic competition.

\textsuperscript{132.} Simson & Jennings, supra note 20, at 187-188.