Bringing Canadian Human Rights Laws to the Centre of the Field: Addressing Policies That Restrict the Participation of Transgender Women in Women's Sport Categories

Jennifer A. Orange†

The inclusion of transgender women and girls in women and girls' sports is one of the most divisive issues in international sport today. Despite the promulgation of policies by sport organizations that regulate if and when a transgender woman or girl may compete in the women's or girls' category, there is little Canadian jurisprudence or legal literature on whether these policies violate athletes' human rights. The goal of this article is to re-centre the Canadian discourse within a human rights legal *lens. Using analogies from human rights law cases and human rights policies in the areas of services and employment, the author concludes that to justify a policy that discriminates on its face, a sport organization must prove, using evidence and not stereotypes, that there is a* bona fide *justification for the policy.*

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† Jennifer A. Orange is an Assistant Professor at the Lincoln Alexander School of Law at Toronto Metropolitan University in Dish with One Spoon Territory. She acknowledges with gratitude research funding for this project provided by The Canadian Centre for Ethics in Sport and the guidance of Dr. Cheri Bradish. She also thanks J. James, Julia MacDonald, and Noelle Sagher for their research assistance, and her colleagues, Professors Hilary Evans Cameron and Luke Taylor, as well as Daniel Simonian, Simon Gooding-Townsend and other generous readers and discussants, for their helpful comments. The author is grateful for the time and expert comments of the anonymous peer reviewers and for the work of the Canadian Journal of Human Rights editorial team. All views and any errors contained in this article are solely her own.

L'inclusion de filles et de femmes transgenres dans les catégories sportives féminines est actuellement l'une des questions les plus controversées du sport international. Même si les organisations sportives adoptent des politiques qui encadrent l'admissibilité des femmes ou des filles transgenres à des épreuves féminines et les situations dans lesquelles celles-ci peuvent concourir, il existe peu de jurisprudence ou de littérature juridique canadiennes sur la question à savoir si ces politiques violent les droits humains des athlètes. Cet article vise à recentrer le discours canadien sur cette question sous l'angle juridique *des droits de la personne. En se fondant sur des analogies tirées de décisions rendues dans les secteurs des services et de l'emploi, ainsi que sur des politiques émanant de commissions des droits de la personne, l'auteure conclut que, pour justifier une politique discriminatoire à première vue, une organisation sportive doit établir, à l'aide de preuves et non de stéréotypes, que la politique en question se justifie réellement.*

I. Introduction

The inclusion of transgender women and girls in women and girls' sport categories is one of the most divisive issues in international sport today.[1] News outlets are regularly publishing headlines regarding the participation of transgender women and girls in sport. Furthermore, sport organizations and international federations are re-evaluating and revising policies that regulate when and how transgender women and girls may, or may not, compete in the women and girl's categories. Until recently most international sport federations followed the International Olympic Committee (IOC) 2004 guidelines that allowed transgender women to compete if they had "surgical anatomical changes", legal recognition of their sex, and hormonal therapy for at least two years (known as the "Stockholm Consensus").[2] In 2021, the IOC released a new framework that prioritized equality and inclusion, but left it to "the remit of each sport and its governing body to determine how an athlete may be at a disproportionate advantage compared with their peers, taking into consideration the nature of each sport."[3]

Some international sport federations have since established policies that restrict the participation of transgender women and girls in the name of safety or fair competition. For example, World Rugby issued a policy that states, "Transgender women who transitioned post-puberty and have

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1 This article concerns the participation of "transgender women and girls" in women and girls' sport categories, that is, women and girls who were assigned male at birth by health-care professionals and/or their family. Transgender woman is the term largely used by the sport community. I acknowledge that the "trans" portion of the term may be problematic because many women and girls do not identify with being transgender. Their gender was incorrectly assigned at birth, and they are now living as their gender. They have affirmed their gender by taking active steps to live as women and girls. I use the terms "transgender women and girls" with this knowledge and will continue to work to find terminology that respects the dignity of gender diverse persons. I also acknowledge that there are many experiences of gender diversity that, together with the categorizations of gender by sport organizations, affect athletes' abilities to participate in sport. This article's analysis may apply to some of those identities and not to others. I hope that this article is a further opening for a discussion on gender diversity in sport through a human rights lens.

2 IOC News, "IOC approves consensus with regard to athletes who have changed sex" (16 May 2004), online: <stillmed.olympics.com> [perma.cc/R9N9-JA2J].

3 IOC News, "IOC releases Framework on Fairness, Inclusion and Non-discrimination on the basis of gender identity and sex variations" (16 Nov 2021), online: <olympics.com> [olympics.com/ioc/news/ioc-releases-framework-on-fairness-inclusion-and-non-discrimination-on-the-basis-of-gender-identity-and-sex-variations]; International Olympic Committee, "IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations" (16 November 2021), online: <stillmed.olympics.com> [perma.cc/L68Q-TZ5U]

experienced the biological effects of testosterone during puberty and adolescence cannot currently play women's rugby."[4] Similarly, World Aquatics (formerly FINA), the international federation for swimming, established a policy that provides, "Male-to-female transgender athletes (transgender women) and athletes with 46 XY DSD whose legal gender and/or gender identity is female are eligible to compete in the women's category … if they can establish to World Aquatic's comfortable satisfaction that they have not experienced any part of male puberty beyond Tanner Stage 2 or before age 12."[5] In March 2023, World Athletics issued a similar policy excluding "male-to-female transgender athletes who have been through male puberty from female World Rankings competition from 31 March 2023."[6]

Canadian sport organizations have been mixed in their response to the international federations' policies. Swimming Canada voted to follow the World Aquatics policy while Rugby Canada rejected World Rugby's limitations and continues to follow the Canadian Centre for Ethics in Sport's (CCES) guidance document, which will be discussed further below.[7]

Although transgender men and boys also face discrimination in sport, official policies tend to permit them to play in men's categories either without restriction or with medical "confirmation of physical abilities" requirements, written acknowledgements of risks, and therapeutic use exemptions for treatment with testosterone or other anabolic substances that may be used in male-to-female gender-affirming hormone treatment.[8] While much of the legal analysis set out in this article will apply to claims of discrimination by transgender men and boys, they are deserving of a separate analysis that is beyond the scope of this article.

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4 World Rugby, "Transgender Guidelines" (May 11 2021), online: <world.rugby> [perma.cc/KF74-7J4U].

5 FINA, "Policy on Eligibility for the Men's and Women's Competition Categories" (24 March 2023), online: < resources.fina.org> [perma.cc/55Q7-BCS2].

6 World Athletics, "World Athletics Eligibility Regulations for the Female Classification (Athletes with Differences in Sex Development)" (23 March 2023), online: <worldathlethics.org> [perma.cc/QG6R-CXMR]. Version 3.0 was approved by Council on 23 March 2023 and came into effect on 31 March 2023.

7 CTVNews, "Canada voted in favour of world swimming body's transgender policy"(21 June 2022), online: <ctvnews.ca> [perma.cc/M4L4-5UQT]; Rugby Canada, "RUGBY CANADA PROVIDES UPDATE ON FEEDBACK TO PROPOSED TRANSGENDER GUIDELINES" (3 September 2020), online: < rugby.ca> [perma.cc/4HZL-ZUU9]; Canadian Centre for Ethics in Sport, "Creating Inclusive Environments for Trans Participants in Canadian Sport: Guidance for Sport Organizations" (2016, online: <cces.ca> [perma.cc/U2T3-W776].

8 For examples, see *FINA*, *supra* note 6; World Rugby, "Transgender Guidelines | World Rugby", online: <world.rugby> [perma.cc/9V59-3FES].

The goal of this article is to examine Canadian human rights law and re-centre the Canadian discourse on the participation of transgender women and girls within a human rights legal lens. Even though sport organizations continue to draft policies that explicitly restrict the participation of transgender athletes, little scholarship exists on how domestic human rights laws apply to these policies.[9] While there have been numerous publications that address transgender inclusion and experiences from a sociological or philosophical perspective,[10] and there is important work on the law in other jurisdictions,[11] legal literature in Canada is lacking. In "Law and Regulatory Barriers to Increasing Inclusivity for Trans Athletes", Seema Patel noted the lack of consideration given to this issue from a human rights perspective, as well as the lack of case law:

> The over-reliance on science instead of human rights leads to barriers to inclusivity for trans athletes because it prioritises sport interests over athletes' rights and neglects the importance of balancing both values.[12]

A doctrinal legal analysis uses different frameworks than those used in other fields, such as biology, philosophy or sociology. A doctrinal legal analysis focuses on primary legal sources, such as case law and statutes, to reason through particular sets of facts and issues. Using these frameworks, we can predict legal outcomes and then analyze the impact of these outcomes on individuals and groups.

In Canada, there is limited legal precedent to use for this analysis. The 2016 preliminary ruling by the Human Rights Tribunal of Ontario (HRTO) in *Worley v Ontario Cycling Association*[13] is the only reported case in Canada that addressed restrictions on the participation of transgender athletes and,

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9 Seema Patel, *Law and Regulatory Barriers to Increasing Inclusivity for Trans Athletes* in Gemma Witcomb & Emma Peel, eds, *Gender Diversity and Sport: Interdisciplinary Perspectives* (London: Routledge, 2022) 1 at 35.

10 See, for examples, Madeleine Pape, "Feminism, Trans Justice, and Speech Rights: A Comparative Perspective" (2022) 85:1 Law and Contemporary Problems 215; Ann Travers, "The Sport Nexus and Gender Injustice" (2009) 2:1 Studies in Social Justice 79; Ann Travers & Jillian Deri, "Transgender inclusion and the changing face of lesbian softball leagues" (2011) 46:4 Int Rev Sport Sociol 488; Veronica Ivy, "If 'Ifs' and 'Buts' Were Candy and Nuts: The Failure of Arguments Against Trans and Intersex Women's Full and Equal Inclusion in Women's Sport" (2021) 7:2 Feminist Philosophy Quarterly, online: <ojs.lib.uwo.ca> [perma.cc/3S5S-PP3T].

11 See, for examples, Catherine Ordway et al, "Human Rights and Inclusion Policies for Transgender Women in Elite Sport: The Case of Australia 'Rules' Football (AFL)" (2023) Sport, Ethics and Philosophy 1; Erin Buzuvis, "'On the Basis of Sex': Using Title Ix to Protect Transgender Students from Discrimination in Education" (2013) 28:3 Wis JL Gender & Soc 219.

12 Patel, *supra* note 10 at 38.

13 *Worley v Ontario Cycling Association*, 2016 HRTO 952 [*Worley*].

according to Patel, is one of the few decisions worldwide on the restriction of transgender athletes.[14] Because there is only one case (and an interim decision at that) that addresses this exact fact situation, a legal analysis must then rely on finding analogous cases to predict how a court would decide a future case.

Outside of the case law, literature in Canada that approaches transgender participation in sport from a human rights legal perspective is scarce. The Canadian Centre for Ethics in Sport (CCES) published a report in 2016 that focused on the inclusion of transgender athletes and emphasized the importance of using a human rights approach. The CCES is one of the few organizations that mentions human rights law in its policies.[15] Its 2016 report highlighted that the Expert Working Group, created to do research and consult on policies, felt that there were numerous reasons for an inclusion-first policy to be adopted, even at the highest levels of sport competition. Most prominently, they noted that individuals have a right to compete with the gender with which they identify, unless there is evidence that supports additional requirements and that those requirements do not violate human rights law.[16] However, there is a lack of literature on what human rights law requires in such cases.

The bulk of the discourse in literature and sport policy regarding transgender participation in sport surrounds stated concerns of fairness and integrity. "Fairness" and "integrity" are defined differently depending on what values the researcher, the sport organization or their subject athletes promote. Michael Burke notes that there are different types of unfairness built into the rules of sport and that we should be suspect of those that claim that certain features are essential for the sport when those features were created by those who have long excluded women.[17] Sarah Teetzel conducted one-on-one interviews with five high-performance cisgender[18] athletes and

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14 Patel, *supra* note 10 at 46.

15 Canadian Centre for Ethics in Sport, *supra* note 8.

16 *Ibid* at 20.

17 Michael Burke, "Trans women participation in sport: A feminist alternative to Pike's position" (2022) 49:2 J Philos Sport 212 at 216 [*Burke*].

18 Cisgender is defined as a gender identity that corresponds with the sex the person was identified as having at birth: Merriam-Webster Dictionary, "Cisgender Definition & Meaning", online: < merriam-webster.com> [perma.cc/HL8X-FDTB].

five transgender athletes to study transgender eligibility policies.[19] The results showed that athletes want a "fair" game, but are not certain on what that actually entails. Fairness has therefore encapsulated many different forms, including one that Teetzel argues includes "equality of opportunity."[20]

Teetzel and Weaving wrote that reservations surrounding fairness are often based on outdated fears – including the presumption that Indigenous peoples used to have unfair advantages in sport.[21] They added that reducing fairness to perceived (and not confirmed) physiological differences comes from heterosexist, cisnormative ideals in sport culture and is therefore incompatible with human rights policy.[22] Teetzel argued that "not all sports rules are automatically fair and justifiable just because they are agreed upon by organizers and participants."[23] Burke noted that unfairness is built into international rugby because some nations always beat others, they have more players and more resources, and the rules allow players to move and play for countries where they can make a living.[24] This means that the fact that a rule is present in a policy or rulebook does not make the rule inherently fair or non-discriminatory or the competition fair overall.[25] If fairness can be understood this way, it can be argued that some ideals of fairness, often based on outdated fears or structural power imbalances, are incompatible with human rights principles. Shawn Harmon argued that true integrity and fairness avoid exclusion based on gender, gender identity or gender expression.[26]

Answering the question of how to weigh different perceptions of fairness, particularly in elite sport, is a challenge. Teetzel and Weaving argued that to develop equitable and fair policies, more robust and thorough

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19 Sarah Teetzel, *Athletes' Perceptions of Transgender Eligibility Policies Applied in High-Performance Sport in Canada* in Eric Anderson & Ann Travers, eds, *Transgender Athletes in Competitive Sport* (London: Routledge, 2017) at 69.

20 *Ibid* at 73.

21 Sarah Teetzel & Charlene Weaving, "Gender Discrimination in Sport in the 21st Century: A Commentary on Trans-Athlete Exclusion in Canada from a Sociohistorical Perspective" (2017) 48:2 Sport History Review 185 at 188.

22 *Ibid* at 190.

23 Sarah Teetzel, "The Onus of Inclusivity: Sport Policies and the Enforcement of the Women's Category in Sport" (2014) 41:1 J Philos Sport 113 at 117.

24 Burke, *supra* note 20 at 14.

25 Teetzel, *supra* note 20.

26 Shawn HE Harmon, "Gender inclusivity in sport? From value, to values, to actions, to equality for Canadian athletes" (2020) 12:2 Sport Policy and Politics 255 at 262.

research on transgender athletes' experiences must occur.[27] Moreover, there is a constant tension between fairness in participation, that is, who gets the opportunity to play, and fairness in competition.

Veronica Ivy and Aryn Conrad have emphasized the need to take the conversation out of the realm of fairness and into a human rights framework. They referred to international human rights law and argued that sport policies should be held to a legal test that focuses on whether it is necessary to exclude transgender women and girls to ensure that important social goals are met, such as fairness, health and safety.[28]

With some notable exceptions, such as, Ivy's, Ivy and Conrad's, and Ordway et al.'s work, the literature generally fails to address the fact that notions of fairness and integrity do not necessarily have the weight to override claims of discrimination.

Because human rights law is grounded in the spirit of inclusion and the dignity of the person, human rights theories approach the analysis of transgender participation in sport from the opposite position of sport organizations that allow trans participation only if certain conditions are met. Human rights legislation and case law assumes that discrimination regarding certain personal characteristics is prohibited and then sets out the ways in which some discrimination may be legally justified. Despite the lack of Canadian case law on this specific issue to date,[29] human rights law in Canada provides a rich framework for analyzing when policies that exclude a class of individuals may or may not be acceptable. This framework requires the party wishing to maintain a discriminatory policy to prove on a balance of probabilities, using evidence, that there is a *bona fide* justification for the discriminatory policy.

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27 Teetzel & Weaving, *supra* note 22 at 68.

28 Veronica Ivy (previously Rachel McKinnon), "Participation in sport is a human right, even for trans women" (17 June 2019), online: <sportsintegrityinitiative.com> [perma.cc/43KS-4H2Z]. See also Veronica Ivy & Conrad, Aryn, "Including Trans Women Athletes in Competitive Sport: Analyzing the Science, Law, and Principles and Policies of Fairness in Competition" (2018) 46:2 Philosophical Topics, online: <muse.jhu.edu>.

29 There have been a number of cases at the Court of Arbitration for Sport that addressed the IAAF's requirements of athletes with Differences of Sex Development. These cases have had mixed results. See, for examples *Dutee Chand v Athletics Federation of India (AFI) & International Association of Athletics Federations (IAAF)*, 2014 CAS A 3759; *Semenya v International Association of Athletics Federations*, CAS 2018/O/5794, CAS 2018/O/5798; *Semenya v Switzerland,* no 10934/21 (ECtHR, July 11, 2023).

It is important to note that there is debate as to whether the human rights legal system contributes positively to the experiences of transgender persons. As Florence Ashley wrote:

> An exclusive focus on anti-discrimination and hate crime laws maintains a façade of equality which obscures the violence and inequality inherent in society's understanding and ordering of trans existence. On their own, they are a poisoned gift which fails to alter the material conditions under which trans people live. Worse, they create perceptual barriers to further trans emancipation by protecting the minority of trans people who can readily access legal and criminal institutions, only metaphorically extending this protection in the social imaginary to all trans people by drawing on the symbolic power of formal equality and the rule of law. In day-to-day life, those laws fail to protect most trans people.[30]

Despite the evident challenges in using human rights law to achieve equality for transgender persons, the literature shows that legal battles are inevitable no matter which way the pendulum swings when it comes to fairness. The CCES stated:

> Organizations should recognize that without clear evidence, they are at risk of legal challenges from trans athletes who may challenge discriminatory requirements that compel them to undergo hormone therapy to compete. It is also possible that, in the absence of these requirements, cisgender female athletes may challenge the organization on fair access to opportunities and fair competition.[31]

This article offers a human rights analysis to the regulation of transgender participation in sport based on the principles found in the legislation and case law from different Canadian jurisdictions. First, it will briefly set out the Canadian human rights legal landscape that is created through Canada's international human rights law obligations, the various federal, provincial and territorial human rights statutes, and the *Canadian Charter of Rights and Freedoms* [the *Charter*].[32] Although the *Charter* forms a critical part of the development of human rights law in Canada, it will not be the focus of this article as its application to sport organizations is likely limited.[33]

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30 Florence Ashley, "Don't Be So Hateful: The Insufficiency of Anti-discrimination and Hate Crime Laws in Improving Trans Well-Being" (2018) 68:1 UTLJ 1 at 7. See also Dean Spade, "Laws as Tactics" (2011) 21:2 Colum J Gender & L 40.

31 Canadian Centre for Ethics in Sport, *supra* note 8 at 21.

32 *Canadian Charter of Rights and Freedoms*, s 8, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

33 The application of the *Charter* to sports organizations is a topic worthy of development and will be the subject of my future work.

I will then proceed to address the question of whether human rights legislation generally applies to sport organizations and in what contexts. Assuming that human rights legislation applies to sport organizations mainly as service providers, this article will review the steps created by human rights legislation that a commission, tribunal or court may use to decide whether a policy excluding transgender women and girls from competing in a women and girls' category is permissible under the law.[34] While the interaction of the various human rights tribunals and arbitrations at the Sport Dispute Resolution Centre of Canada is beyond the scope of this article, I note that the applicable law of those arbitrations is the law of the Province of Ontario, so that arbitrators are able to apply the *Ontario Human Rights Code* and applicable case law and use their frameworks in their decisions.[35] The recent decision by the European Court of Human Rights in *Semenya v Switzerland* may be interpreted to mean that sport arbitration bodies must engage with human rights laws in their decisions.[36] My hope is that this article will be helpful to sport organizations and athletes as they work to ensure policies that follow human rights laws in Canada.

II. The Human Rights Legal Landscape in Canada

Human rights law in Canada, including the right to be free from discrimination based on sex, sexual orientation, gender identity and gender expression, is grounded in the principles and legal commitments that Canada has made internationally over the last 75 years. Although this article will focus on human rights law in Canada, it is helpful to review the international roots of Canada's human rights obligations, and the concept of state responsibility for the implementation and enforcement of human rights law.

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[34] Depending on the jurisdiction or litigation stage, in Canada human rights cases may be heard at human rights commissions, human rights tribunals or courts. For the sake of brevity, in this article I will proceed to refer to decision makers as courts or tribunals.

[35] Sport Dispute Resolution Centre of Canada, "Canadian Sport Dispute Resolution Code" (October 1 2023), online: <crdsc-sdrcc.ca> [perma.cc/588E-9QKG] at 17.

[36] *Semenya v Switzerland*, *supra* note 30; Michelle Krech, "Who Is Responsible for Ensuring Human Rights in Global Sport?" (8 April 2023): online (blog): <völkerrechtsblog.org> [perma.cc/Y4JB-62S4].

A. The International Roots of Canadian Human Rights Law

Modern international human rights law is grounded in concepts of dignity. Canada was a signatory to the *Universal Declaration of Human Rights* (*UDHR*) in 1948, one of the early initiatives of the United Nations.[37] The *UDHR* built the foundation for human rights law in the 20th century.[38] The preamble of the *Declaration* situates the rights set out in the text in key concepts of dignity and equality. The preamble states, in part:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world …
>
> Whereas the peoples of the United Nations have in the [UN] Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom …[39]

The first article of the *Declaration* again focuses on dignity and equality:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.[40]

The concept of dignity is not easy to define. Glenn Hughes wrote about the ways that "dignity" is used in the *UDHR*:

> The core constellation of meanings in the concept of human dignity consists then of four elements: liberty, responsibility, irreplaceability, and vulnerability to suffering and degradation. This is in fact the concept of human dignity that informs the Universal Declaration. Human rights derive from human dignity, since it is because we are responsibly self-determining, unique, and vulnerable beings that we have an inalienable right to those conditions and opportunities that will allow us to freely and fully develop as persons.[41]

The Supreme Court of Canada (SCC) defined dignity in *Law v Canada (Minister of Employment and Immigration)*:

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[37] *Universal Declaration of Human Rights*, 217 A (III) 1948 [*UDHR*].

[38] While the *UDHR*'s language has been described as aspirational, over time most of its provisions have become accepted as binding customary international law. See Hurst Hannum, "The UDHR in National and International Law" (1998) 3:2 Health and Human Rights 144–158.

[39] *UDHR*, *supra* note 38.

[40] *Ibid*. There are several UDHR articles that may apply to transgender rights, such as Arts. 2, 7, 12, 26, 27 and 29.

[41] Glenn Hughes, "The Concept of Dignity in the Universal Declaration of Human Rights" (2011) 39:1 J Religious Ethics 1–24 at 10.

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?[42]

Equality is defined in Canadian law to mean substantive equality:

> "Substantive equality" requires acknowledgment of and response to differences that members of a particular group might experience in order to be treated equally. It takes into account patterns of disadvantage that may require proactive responses to address. It is distinguished from "formal equality", which requires treating "likes alike" and "unlikes" differently to achieve equality, while substantive equality may require treating people differently in order to achieve equality.[43]

Concepts of dignity and equality form the basis of human rights internationally and will be important to recall when considering how human rights law apply in Canada.

After the *UDHR*, the UN created the two major human rights treaties, the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*[44] and the *International Covenant on Civil and Political Rights (ICCPR)*.[45] When these treaties were opened for signature in 1966, the UN created a binding international human rights legal regime that guaranteed basic human rights, including rights that apply to transgender persons. For example, Article 26 of the *ICCPR* requires states to respect and ensure that everyone is equal before the law, without discrimination on grounds such as sex. The *ICESCR* requires states to recognize, among other rights, just and favourable conditions at work, including safe and healthy working conditions (Art. 7);

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42 *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 53.

43 Patricia Hughes, "Supreme Court of Canada Equality Jurisprudence and 'Everyday Life'" (2012) 58:1 SCLR 246, online: <osgoode.yorku.ca> [perma.cc/2L4G-SQLB] at 246–247.

44 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [*ICESCR*].

45 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171(entered into force 23 March 1976) [*ICCPR*].

the right to enjoy the highest attainable standard of physical and mental health (Art. 12); the right to education (Art. 13); and the right to take part in cultural life (Art. 15). All of the rights in both the *ICCPR* and the *ICESCR* must be exercised without discrimination "of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[46] As of 2011, the UN Human Rights Council supported the inclusion of gender, gender identity, gender expression and sexual orientation in the list of protected grounds under the international human rights conventions.[47]

The international community has since developed more specific treaties to expand the body of human rights law. A number of these – such as the *International Convention on the Elimination of All Forms of Racial Discrimination*,[48] the *Convention on the Elimination of Discrimination Against Women*,[49] the *Convention on the Rights of the Child*[50] – affect the rights of transgender persons, recognizing the intersection of their gender with other personal characteristics, such as age, disability and race. Canada is a state party to each of these treaties.

When Canada agreed to be bound by the treaties, it undertook to give effect to the treaty commitments through legislation and other measures, including the courts and administrative systems.[51] In part, Canada meets these obligations through its education systems, the enforcement of the *Charter of Rights and Freedoms*, the promulgation of federal, provincial and territorial human rights legislation, and human rights institutions, such as the commissions and tribunals that provide education and enforcement mechanisms for human rights law.

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46 *Ibid* at art 2; *ICESCR*, *supra* note 44 art 2.

47 United Nations Office of the High Commissioner for Human Rights, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law,* 1st ed (United Nations: New York and Geneva, 2012), online: <ochr.org> [perma.cc/5UVG-5ZT8].

48 *International Convention on the Elimination of All Forms of Racial Discrimination,* 21 September 1965, 660 UNTS 195 (entered into force 4 January 1969) [*ICERD*].

49 *Convention on the Elimination of All Forms of Discrimination Against Women,* 18 September 1979, 1249 UNTS 14 (entered into force 3 September 1981).

50 *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) [*CRC*].

51 See, for examples, *ICCPR* art 2, *ICERD* art 2, and *CRC* art 2.

B. *Canadian Charter of Rights and Freedoms*

Opponents of policies that include transgender women and girls in women and girls' sport categories may assert that they violate the *Charter* rights of cisgender women and girls. I will review the *Charter's* equality provision briefly here, as the application of the *Charter* to sport organizations, such as Canada's national team programs, is a topic deserving of its own rigorous analysis. Section 15 of the *Charter*, which came into force in 1985, has two subsections and states:

> Equality before and under law and equal protection and benefit of law
>
> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> Affirmative action programs
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Simply put, section 15(1) prevents the government from discriminating against individuals based on certain characteristics. The courts have found that the list of characteristics protected by section 15(1) includes sexual orientation,[52] and that transgender status is either covered by the ground of sex or is analogous to sex.[53]

Section 15(2) ensures that government programs that work to ameliorate discrimination are not prohibited. For example, a program that makes a distinction in an effort to ameliorate the condition of a disadvantaged group may be protected by the section.[54] There is a potential argument that women's sport categories were created to address the "disadvantaged" condition of women and girls in sport.[55] When we consider the social,

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[52] *Egan v Canada*, 1995 CanLII 98 (SCC); *Vriend v Alberta*, 1998 CanLII 816 (SCC).

[53] *CF v Alberta (Vital Statistics)*, 2014 ABQB 237.

[54] *R v Kapp*, 2008 SCC 41 (CanLII).

[55] One argument advanced by those who wish to restrict the participation of transgender women and girls from competing in women's and girls' categories is that such participation will threaten the

political and legal disadvantages experienced by transgender persons as recently recognized by the SCC in *Hansman v Neufeld*,[56] it makes sense also to consider whether the goals of having women's and girls' categories are furthered by including transgender women and girls.

Despite this critical discussion, I have decided to focus my analysis on the application of human rights legislation, and not the *Charter*, because of the limited application of the *Charter*. Section 32(1) of the *Charter* states:

> This Charter applies:
>
> a. to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> b. to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

The purpose of the *Charter* is to check the power of the government over individuals.[57] It therefore does not apply to private actors or private action. For example, a private tennis club's decision to exclude a person because of their race would not offend the *Charter* because the tennis club is not a government actor.[58] The tennis club's activities would likely be subject to human rights legislation in its home province.

This is not to say that the *Charter* would never apply to a sport organization. While my view is that it is unlikely at the moment, it is possible that a court could find that a national or provincial sport organization is under sufficient government control that the *Charter* applies to its activities. As set out by the SCC in *Eldridge v British Columbia (Attorney General)*,[59] the *Charter* may apply to an entity depending on (1) the nature of the actor or (2) the nature of the action. If the actor is part of the government due to the nature of the actor or the fact that it is under substantial governmental

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ameliorative objective of the women's and girls' categories as authorized by s. 15(2) of the *Charter*. As will be discussed below regarding the tests set out in human rights law, sport organizations attempting to advance this argument will be required by tribunals and courts to provide evidence of such a threat. Others, such as Martínková et al. argue that the sport categories should be defined by sex and not gender to ensure fairness. Although a full review of this argument (and the counter arguments) is beyond the scope of this article, the concept of fairness in the Canadian human rights case law is addressed below. See Irena Martínková & et al, "Sex and gender in sport categorization: aiming for terminological clarity" (2022) 49:1 J Philos Sport 134–150.

56 *Hansman v Neufeld*, 2023 SCC 14 at paras 84-89.

57 *McKinney v University of Guelph*, 1990 CanLII 60 (SCC) at 261.

58 See also *RWDSU v Dolphin Delivery Ltd*, 1986 CanLII 5 (SCC); *Vriend v Alberta*, *supra* note 53.

59 *Eldridge v British Columbia (Attorney General)*, 1997 CanLII 327 (SCC).

control, then the *Charter* will apply. If the actor is not part of the government but is implementing a government policy or program, then it may be required to comply with the *Charter* because of the nature of its activity. The key test will be whether the actor is under regular and routine control of the government.[60] Significantly, in *McKinney v University of Guelph*, the SCC found that receiving significant government funding or the fact that there is significant regulation of the entity's activities does not amount to "routine and regular control".[61] In *McKinney*, the Court held that universities are not government actors, so it follows that the *Charter* does not apply to university decisions regarding their athletics programs. On the other hand, courts have held that the *Charter* applies to public elementary and secondary schools, so policies restricting transgender girls from participation in public school sports will be required to pass *Charter* scrutiny if challenged.[62]

This section has briefly introduced the concepts of the equality section of the *Charter* and the potential for its application to many kinds of sport organizations, from recreational and school sports to elite sport programs. In the future, I hope to provide a more detailed analysis of the work and governance of Canada's national and provincial sport organizations to determine whether the *Charter* applies to their activities or to the activities of other sport organizations that have a relationship with, or advance the policies or programs of, the federal, provincial or municipal governments.

C. Human Rights Legislation in Canada

While the *Charter* applies to government action at both the federal and provincial/territorial levels, human rights legislation implemented across the country, much of which was enacted before the *Charter*, provides a broader application for certain human rights protections and has quasi-constitutional status.[63] Each province, territory, and the federal government has enacted human rights legislation that, unlike the *Charter*, applies in both public and private spheres on the basis of specific grounds in limited contexts or areas. To bring a claim under a human rights statute, the claim must describe discrimination on one of the prohibited grounds and within

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60 *Douglas/Kwantlen Faculty Assn v Douglas College*, 1990 CanLII 63 (SCC).

61 *McKinney v University of Guelph, supra* note 57.

62 See, for examples, *R v Cole*, 2012 SCC 53 (CanLII) and *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 (CanLII).

63 *Canada (Attorney General) v Mossop*, 1993 CanLII 164 (SCC).

one of the covered areas, such as services, accommodation (housing), contracts or employment.[64] Each statute in Canada prohibits discrimination on the ground of sex, as well as a combination of gender, gender identity and/or gender expression. The vast majority of the statutes explicitly prohibit discrimination in the areas of employment and services, the two areas most applicable to sport organizations.

To illustrate the structure and content of human rights legislation in Canada, I will use the provisions of the *Ontario Human Rights Code* (*OHRC*)[65] as examples. I emphasize that each statute may have differences that could impact a tribunal or court's interpretation of a certain situation. However, the general principles and approaches to the application of human rights law are similar across Canada.

As with the international human rights treaties, the *OHRC* opens with a preamble that notes Canada's international obligations and situates the *Code* within a recognition of the dignity of the person:

> Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;
>
> And Whereas it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province…[66]

Part 1 of the *OHRC* is titled "Freedom from Discrimination" and opens with the section 1 prohibition against discrimination in services:

> Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

Section 5 prohibits discrimination in employment:

> 5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin,

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[64] See *Human Rights Code*, RSO 1990, c H19, Part I, for an example.
[65] *Ibid*.
[66] *Ibid* at 1 (Preamble).

> citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

The interpretation of these two sections provides the crux of the law in Ontario that would apply to policies that limit the participation of transgender women and girls in women and girls' sport categories. It is important to note that for a policy or action to be held to be discriminatory, it is not necessary for an applicant to prove that the respondent intended to discriminate against them.[67] The fact that the policy has a discriminatory effect is enough. Sport organizations are varied and provide services by offering everything from recreational leagues to elite competitions. Education is a service, and therefore, schools and universities are required to comply with the *OHRC*. This article will focus on the sport organizations as service providers, although in some instances competitors may be employees if they are part of a professional sports team. Professional leagues employ athletes and therefore fall into the category of employment. The legal analysis of discrimination in the social areas of employment and services are not interchangeable, but they are grounded in the same theories, and cases from one area are regularly used by tribunals and courts when they adjudicate cases from another area.[68]

Functioning in a similar way to section 15(2) of the *Charter*, *OHRC* section 14(1) and comparable provisions in other human rights statutes allows for special programs that work to assist disadvantaged persons to achieve substantive equality.[69] Section 14(1) states:

> A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

Section 14(2) provides that a person may apply to the Ontario Human Rights Commission ("Commission") to have a program designated as a special program under section 14(1). With such a designation, a sport organization could argue that a cisgender-women only category is designed

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[67] *Ont Human Rights Comm v Simpsons-Sears*, 1985 CanLII 18 (SCC); Some statutes, such as s 2 of the British Columbia *Human Rights Code* state this explicitly: *Human Rights Code*, RSBC 1996, c 210, s 2.

[68] See, for example, *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, 1999 CanLII 646 (SCC) [*Grismer*].

[69] Although applicable in a different jurisdiction and context, section 14 aims to fulfill a similar purpose as section 15(2) of the *Charter*.

to relieve the disadvantage that cisgender women and girls experience in sport. On the other hand, as stated above, the SCC recognized transgender women and girls as a disadvantaged group and similar arguments could be made that including trans women and girls in their gender category fosters substantive equality.

Furthermore, section 18 allows "special interest organizations" to restrict their membership or participation:

> The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.

This section could also be used to justify both the exclusion and inclusion of transgender women and girls in women and girls' categories. But again, transgender women and girls could argue that it would be unjustifiable to exclude them because they are women and girls.

Before analyzing how courts and tribunals have interpreted these sections, I will first set out the role and policies of human rights commissions within Canadian human rights systems.

D. Human Rights Commissions

In addition to setting out provisions that prohibit discrimination on specific grounds, human rights statutes also establish human rights commissions to promote respect for, and protection of, human rights. Human rights commissions, recognized as national human rights institutions in international law, play critical functions in educating the public about human rights law and developing policies that provide guidance for individuals and organizations.[70] Section 29 of the *OHRC* provides a thorough list of responsibilities for the Commission, including:

> s. 29 (b) to develop and conduct programs of public information and education to,

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[70] United Nations, *National Human Rights Institutions: History, Principles, Roles and Responsibilities* (United Nations: New York & Geneva, 2010), online: <ohchr.org> [perma.cc/8L78-URS9]; Jennifer Carter & Jennifer A Orange, *Emerging Human Rights Institutions: The Case of Museums in a Human Rights Culture* in Shelagh Day, Lucie Lamarche & Ken Norman, eds, *14 Arguments in Favour of Human Rights Institutions* (Toronto: Irwin Law, 2014).

> (i) promote awareness and understanding of, respect for and compliance with this Act, and
>
> (ii) prevent and eliminate discriminatory practices that infringe rights under Part I;
>
> (c) to undertake, direct and encourage research into discriminatory practices and to make recommendations designed to prevent and eliminate such discriminatory practices;
>
> (d) to examine and review any statute or regulation, and any program or policy made by or under a statute, and make recommendations on any provision, program or policy that in its opinion is inconsistent with the intent of this Act;
>
> (e) to initiate reviews and inquiries into incidents of tension or conflict, or conditions that lead or may lead to incidents of tension or conflict, in a community, institution, industry or sector of the economy, and to make recommendations, and encourage and co-ordinate plans, programs and activities, to reduce or prevent such incidents or sources of tension or conflict;
>
> (f) to promote, assist and encourage public, municipal or private agencies, organizations, groups or persons to engage in programs to alleviate tensions and conflicts based upon identification by a prohibited ground of discrimination;
>
> (g) to designate programs as special programs in accordance with section 14…

Human rights commissions across the country conduct research and create educational programs and policy statements to help the public interpret sections of legislation as they apply to emerging situations. Some commissions have issued policy statements, described below, regarding discrimination on the basis of gender identity and gender expression. While these statements are not binding on tribunals and courts, these statements of experts may be persuasive and affect how decision-makers interpret the law and apply it to the cases before them.

i. Relevant Policy Statements by Human Rights Commissions

In 2014, the Commission issued the "Policy on Preventing Discrimination Because of Gender Identity and Gender Expression".[71] This is the broadest policy document on this issue from any human rights commission in Canada to date. This statement recognizes that trans people face forms of social marginalization because of deeply rooted myths and

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[71] Ontario Human Rights Commission, "Policy on preventing discrimination because of Gender Identity and Gender Expression" (2014), online: <ohrc.on.ca> [perma.cc/D9FL-LQWX].

fears in society about people who do not conform to social "norms" about what it means to be a woman or a man. The policy makes clear that under the *OHRC*, employers and service providers have a legal duty to accommodate the needs of people because of their gender identity or gender expression, unless it would cause undue hardship. The goal of accommodation is to help everyone have equal opportunities, access and benefits. Failure to accommodate may lead to a finding of discrimination.[72] The policy also acknowledges that some trans people may require no accommodation at all.[73]

Human rights legislation and case law establishes that organizations may not discriminate on the ground of sex, gender identity or gender expression in the provision of services unless there is a *bona fide* reason for the discrimination.[74] One way an organization can demonstrate a *bona fide* reason for discrimination is to show that accommodating the person or group would cause it undue hardship. This Commission policy is particularly helpful in setting out what sport organizations would need to consider if they were to argue that they cannot accommodate a trans woman because it would cause the organization undue hardship. While the standard developed from the case law will be explained further below, the Commission stated:

- Organizations have a duty to accommodate the needs of trans people and other gender non-conforming individuals, unless it would cause undue hardship.

- Undue hardship is difficult to prove. The [*Ontario Human Rights*] *Code* prescribes only three factors to decide whether an accommodation would cause undue hardship: cost; outside sources of funding, if any; and health and safety requirements, if any.

- The onus of proving it lies with the organization. They cannot rely on impressionistic views or stereotypes, anecdotal evidence or after-the-fact justifications. Nor can an organization speculate as to what might or might not happen if the accommodation is provided. The evidence to prove undue hardship must be real, direct, objective, and in the case of costs, quantifiable.

- The cost standard is a high one. An organization would need to show in an objective way that the cost of the accommodation, for example, would alter the essential nature of what it does or would substantially affect its viability. In making this assessment, organizations should consider: the size of the operation;

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72 *Ibid* at 23.
73 *Ibid* at 24.
74 *Grismer*, *supra* note 68.

whether the costs would be recovered in the normal course of operation or by other divisions or departments; whether the costs can be phased in over a longer time period; and whether the organization can set aside a certain percentage of money every year in a reserve fund to be used for accommodation.

- To offset costs, an organization has an obligation to consider any outside sources of funding or in-kind resources available to make the accommodation. A person seeking accommodation is also expected to take advantage of any available outside resources that could help cover expenses related to the accommodation.

- Health and safety concerns will amount to undue hardship if they are shown to be real and significant. Organizations have a legal obligation to protect the health and safety of all their employees, clients, tenants and others. They should consider whether changing or waiving a health and safety requirement or providing any other type of accommodation might result in a serious health or safety risk. An organization should look at:

    - The nature and severity of the risk

    - The likelihood of it happening, and who might be affected

    - If the risk only involves the person asking for accommodation, would they be willing to assume it?

    - How does the risk compare to other risks allowed within the organization or already tolerated in society as a whole?

- Organizations must try to mitigate or reduce risks where they exist.[75]

This policy statement is a helpful summary of the legal standards and can provide guidance to organizations working to include trans athletes.

Other commissions have issued guides on the meaning of the duty to accommodate. For example, in April 2021, the Alberta Human Rights Commission published the "Duty to Accommodate: Human Rights Guide" (the Guide).[76] The Guide recalls that the characteristics protected by the *Alberta Human Rights Act*[77] include gender, gender identity, gender expression and sexual orientation.[78]

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75 Ontario Human Rights Commission, *supra* note 71 at 31.

76 Alberta Human Rights Commission, "Duty to Accommodate: Human Rights Guide" (2021), online: <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://albertahumanrights.ab.ca/media/pgrdfmor/duty-to-accommodate-human-rights-guide.pdf at 2> [perma.cc/STF2-MGH3].

77 *Alberta Human Rights Act*, RSA 2000.

78 Alberta Human Rights Commission, *supra* note 76 at 2.

After reviewing the relevant case law, the Guide addressed the duty of service providers to accommodate:

> The duty to accommodate in the area of services is important if all members of society are to enjoy full and equal participation in society. For example, discrimination may result from the outright refusal to rent premises or provide a service, or it may result from the imposition of unreasonable or unnecessary requirements based on criteria such as customer or staff preferences.[79]

Although trans women and girls may not require accommodation to participate in women and girls' sport categories, the Guide asserted that the duty to accommodate may be triggered if a sport organization imposes unreasonable or unnecessary requirements.[80] It also noted that those problematic requirements may be based on customer (or in the sport framework—other competitors) or staff preferences.

III. Application of Human Rights Legislation and Case Law

Sport organizations with policies that restrict the participation of transgender women and girls from women and girls' categories risk legal complaints under human rights legislation in Canada. In this section, I will review the tests and factors a tribunal or court would consider when evaluating such a complaint with reference to legislation and case law. As noted above, there is only one reported case in Canada that addresses restrictions on the participation of transgender women in sport. Therefore, in addition to discussing the reasoning in *Worley*, this section will review the general principles that would apply using case law that addresses discrimination in the context of employment and services.

A. Human Rights Legislation and Sport Organizations

There are two key preliminary questions to consider when analyzing policies of sport organizations regarding the participation of transgender women and girls in sport under human rights statutes: (1) is the relationship between the parties one that is governed by the statute; and (2) does the complainant possess a personal characteristic, like sex or gender identity, that is a prohibited ground of discrimination?

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[79] *Ibid* at 20.
[80] *Ibid* at 12–13.

i. Is the Relationship Between the Parties Covered by a Human Rights Statute?

Unlike the *Charter*, human rights statutes in Canada apply to both government and non-government actors in specific contexts. For example, the *Canadian Human Rights Act*[81] protects people in Canada from discrimination when they are "employed by or receive services from the federal government, First Nations governments or *private companies that are regulated by the federal government, such as banks, trucking companies, broadcasters and telecommunications companies*."[82] As reviewed above, the *OHRC* applies to the areas of services, goods and facilities and employment in Ontario through section 1 and 5 respectively. Other provincial statutes have similar provisions. Because there are currently far fewer professional opportunities for women, women athletes most often experience sport organizations as service providers instead of as employers. This section will thus focus on the law that applies to service providers. As mentioned above, the legal tests for service providers and employers are similar, derived from the same principles, and are often derived from overlapping case law.

Simply put, human rights law applies to the policies of sport organizations that limit the participation of transgender women and girls in sport in Canada. A number of decisions have identified sport organizations as service providers for the purposes of provincial human rights legislation.[83] The Human Rights Tribunal of Ontario (HRTO) in *Miller v InterCounty Tennis Association* held that a mixed tennis league that offered women half of the playing opportunities of men discriminated against women in the context of providing a service.[84] The HRTO in *Worley* also found that the provision of racing licenses by cycling organizations was a "service".[85] The applicant argued that she was being discriminated against due to the imposition of anti-doping requirements as a condition of obtaining a race license in Ontario while she relied on "exogenous androgens, such as testosterone, to maintain her health and day-to-day

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81 *Canadian Human Rights Act*, RSC, 1985, c H-6, ss. 2, 5, 7, 8, 10.

82 Canadian Human Rights Commission, "Human Rights in Canada" (6 December 2021), online: <chrc-ccdp.gc.ca/en/about-human-rights/human-rights-canada>. [perma.cc/2VD2-3SB9]

83 For examples, see *Berg v University of British Columbia,* [1993] SCR 353; *University of New Brunswick v New Brunswick (Human Rights Commission),* 2013 NBQB 148; *Beacon Hill Little League Major Girls Softball Team - 2005 v Little League Canada,* 2009 BCWLD 2093.

84 *Miller v InterCounty Tennis Association*, 2018 HRTO 907.

85 *Worley v Ontario Cycling Association*, *supra* note 13.

function".[86] While the case settled and there was no final decision of the HRTO, in its preliminary ruling, the Tribunal established that cycling organizations were services for the purposes of the *OHRC*. Although there is only one case on transgender participation in sport in Canada, the courts are likely to make analogies using cases involving discrimination on the grounds of sex, gender, gender identity and gender expression in other types of services and employment.[87]

Human rights legislation was not created to limit the interactions between private individuals. Most statutes define services as a commodity that is "accessible to the public or to a section of the public."[88] The SCC held in *Berg v University of British Columbia* that in determining whether human rights legislation applies, the courts should assess the public nature of the relationship, whether it is with customers, students or clients. [89] The service does not have to be available to everyone for the legislation to apply.[90] The relationship between service providers and users must be examined thoroughly and individually.[91] By assessing each case individually, a contextual analysis will be able to determine who is considered a "user" of services or the "public," depending on the legislation. These groups can be small or large.[92] The courts are likely to refer to sport as a service, and associations and organizations that provide these services to the public, or sections of the public, are likely to be bound by human rights codes and statutes.

Courts often adopt a two-part analysis to determine what service is being offered and who the service user is.[93] After determining what constitutes "a service," the claimant must demonstrate that a "public relationship" exists between the provider and user.[94] The Federal Court of Canada has stated that every member of the public does not need to have access to a service for it to be considered "publicly available".[95] The SCC subsequently explained

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[86] *Ibid* at para 30.
[87] *Ibid*.
[88] For example, *Manitoba Human Rights Code*, SM 1987-88, c 45, s 13(1).
[89] *Berg*, *supra* note 83.
[90] *Ibid*.
[91] *Ibid,* See also *Rosin v Canadian Forces*, 1990 FCJ 1104 (FCA).
[92] *Berg*, *supra* note 83.
[93] *Bryson v University of New Brunswick (No. 3)*, 2016 CanLII 154162 (NB BHR) at para 131.
[94] *Ibid*.
[95] *Rosin v Canadian Forces*, *supra* note 91 at para 10.

that once a service and its public have been defined, discrimination based on a protected ground is prohibited "within that public".[96]

In contrast, there are examples where courts have held that certain private sport clubs are not public services for the purposes of human rights legislation. For example, the British Columbia Court of Appeal held that a private men's lounge in a private members-only golf club was not a "service or facility customarily available to the public" within the meaning of section 8 of the *British Columbia Human Rights Code;* therefore, the *Code* did not apply.[97] While it is possible that the policies of private sport clubs that have mainly social purposes may not be considered services under human rights legislation, the fact remains that a number of cases referenced above have found that different types of sport organizations are services, even though they provide their services to only a segment of the public.

Sport organizations can also be considered employers for the purposes of human rights legislation. Normally, in situations of employment, a worker must be paid money as wages. In a human rights context, the courts are likely to assess the situation flexibly.[98] For example, when an individual is considered a "utilized" person, this can infer employment; receiving different forms of payments such as honorariums can result in employment; and, more common in sport, being offered room and board can be considered "remuneration" for the purposes of employment and employment law.[99] It does not matter if work for an employer took place in exchange for money.[100]

ii. Does the Individual in Question Have a Personal Characteristic that is Recognized as a Ground Under Human Rights Legislation?

Transgender athletes may allege discrimination on the basis of one or more of the grounds of gender, gender identity, gender expression, and sex. Once a court has determined that a human rights statute applies to the situation, it will apply the appropriate test to determine whether a sport organization has discriminated against the transgender athlete through a

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96 *Berg v University of British Columbia*, [1993] 2 SCR 353 at para 55.
97 *Marine Drive Golf Club v Buntain et al and BC Human Rights Tribunal*, 2007 BCCA 17.
98 *Fontaine v Canadian Pacific Ltd*, 1990 FCJ 1028 at para 12.
99 *Rosin v Canadian Forces*, *supra* note 91 at para 31.
100 *Ibid* at para 26.

policy or action, and if so, whether there is a *bona fide* justification for that policy or action that excuses the discrimination.

IV. How to Determine Whether a Sport Organization Has Discriminated Against a Transgender Athlete

In the 1999 *Meiorin* case, a case regarding a woman forest firefighter who was laid off because she failed part of the provincial fitness test, the SCC outlined the legal test to determine whether an employer has: (1) discriminated against an individual, and (2) whether the organization can justify that discriminatory policy or action as a "*bona fide* occupational requirement" or "BFOR".[101] The foundation for the BFOR test in employment cases is similar to the *bona fide* justification test that is used in cases regarding the provision of a service.

First, the Court in *Meiorin* held that it is no longer necessary in law to create different legal tests for direct and adverse effects discrimination. Direct discrimination occurs when a policy prohibits a certain category of people from participation. For example, if a sport organization issued a policy that said that no transgender women may participate in the women's category, it would constitute direct discrimination, subject to a determination regarding the existence of a *bona fide* justification. The policy excludes a class of people on its face. If, on the other hand, the policy states that no athletes with testosterone above a certain level are permitted to compete in the women's category, transgender women are not excluded on the face of the policy but may experience an adverse effect because of their gender identity.[102] The two types of discrimination are not always distinct, and in either case, the *Meiorin* test applies.[103]

A. The Test for Establishing Discrimination

Noting that differentiating between adverse and direct discrimination was unrealistic and unnecessary, the Court in *Meiorin* created a three-part test to adjudicate all cases of discrimination.[104] The SCC subsequently

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[101] *British Columbia (Public Service Employee Relations Commission) v BCGEU ("Meiorin")*, [1999] SCR 3 at para 3.

[102] *Worley v Ontario Cycling Association*, *supra* note 13.

[103] *British Columbia (Public Service Employee Relations Commission) v BCGEU ("Meiorin")*, *supra* note 101 at para 29.

[104] *Ibid* at para 54.

applied this test to the area of services in *Moore v British Columbia (Ministry of Education)*. *Moore* concerned a student with severe learning disabilities who required intensive remedial help. When the school district closed the centre that provided him help, his only option became private school. His father then filed a discrimination complaint with the British Columbia Human Rights Tribunal. Although Moore was successful at the Tribunal, the case was appealed all the way to the SCC. The SCC held that to establish a *prima facie* case of discrimination, a claimant must prove that:

1. they possess a characteristic that is protected from discrimination under the relevant *Code* or *Act*;
2. they experienced an adverse impact in regard to a service; and
3. their protected characteristic was a factor in the adverse impact.[105]

Accordingly, if transgender women and girls are excluded from a competition based on a sport organization's policy, they would have to prove that they suffered an adverse impact in receiving a service. They also need to prove that the adverse impact was connected to their protected ground, that is, at least one of sex, gender, gender identity or gender expression, depending on the particular human rights statute. Although this test is a required hurdle for discrimination claimants, it is not where the crux of the dispute lies for transgender women and girls. More complex arguments lie in whether the sport organization can provide a legal defence by proving its discriminatory policy has a *bona fide*, or reasonable, justification.

B. The *Bona Fide* Justification Defence

If the claimant proves that discrimination has taken place, the burden of proof then shifts to the respondent, who may argue that the impugned standard has a *bona fide* justification. In the employment context, the respondent must be able to demonstrate on a balance of probabilities:

1. that the employer adopted the standard or rule for a purpose rationally connected to the performance of a job;

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[105] *Moore v British Columbia (Ministry of Education)*, [2012] 3 SCR 360 at para 33.

> 2. that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
>
> 3. that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship on the employer.[106]

If a service provider or employer can prove that a *bona fide* justification is in place for the policy, a court will hold that there has not been a breach of the relevant human rights statute.

When laying out their claim for a *bona fide* justification, employers and service providers choose or define their own "purpose" for the policy, but they must demonstrate that the policy's purpose is rationally connected to the objective requirements of the job or service.[107] By way of example, in *XY v Ontario*, the HRTO stated that "the respondent has not established that allowing transgendered persons to change the sex designation on their birth registrations and birth certificates without surgery would make vital event data less accurate and reliable than it is under the current system, let alone to the point of imposing undue hardship on the respondent."[108] The respondent did not prove the connection between the exclusionary policy and the purpose of the service.

If, as an example, the organization says the purpose of a discriminatory policy is safety, the focus shifts to how it is able to achieve the goal of safety. The employer or service provider would be allowed to set out standards that are reasonably required to fulfill their goal of safety, but they would not be allowed to set standards that are higher than necessary or irrelevant to work or service. The safety standards must be rationally connected to the purpose of the policy in question. In *Grismer*, the SCC determined that absolute safety is not a reasonable goal for services when it is impossible to guarantee it in situations where some risk is recognized and accepted, such as driving a car.[109] That case concerned a blanket rule that denied driving licenses to people with limited vision. The SCC found that conducting individual testing to ensure that safety standards are met did not cause undue hardship

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[106] *Meiorin*, *supra* note 101 at para 54.
[107] *Ibid* at para 58.
[108] *XY v Ontario (Government and Consumer Services)*, 2012 HRTO 726 at paras 238 and 240.
[109] *Grismer*, *supra* note 68 at para 26.

on the BC Superintendent of Motor Vehicles and found that the blanket rule led to discrimination. Moreover, the idea of "risk" is not sufficient on its own to justify discrimination.[110]

The SCC's approach to risk in *Grismer* is an important one for sport organizations that intend to argue that the inclusion of transgender women and girls in women or girls' categories poses an unacceptable level of safety risk to other athletes. As described above, the organization will have to demonstrate that there is a rational connection between an exclusionary policy and player safety, acknowledging that all athletes assume some risk when competing. The level of risk in sport may be influenced by many factors, such as the nature of the sport, the rules, the competitive level, the age group, weight class, equipment used, and even the weather. Can the sport organization establish that the same safety standards apply to all the athletes regardless of gender identity? What will the evidence show that the sport organization does in the face of risks to players in other circumstances? World Rugby justified its policy by listing the biological advantages from testosterone and the resultant performance differences and the potential for injury in a combatant sport.[111] Burke noted that there may be other ways to reduce risk in sports with tackling, such as rule changes that reduce the risk of injury rather than eliminating concussion-risking collisions.[112]

Sport organizations, such as the case with World Aquatics, may also argue that a restrictive policy is required in the name of fairness, because they hold that transgender women and girls have an unfair advantage in the sport. Again, the concept of what is fair and what provides a competitive advantage in a sport will have to be proven with evidence that is not based on stereotypes. Ordway et al argue that competitive advantage must be examined within each sport and that "notions of fair sport do not trump the legal rights of transgender women to participate in sport."[113]

In employment cases, the case law focuses on whether people have been accommodated to the point of undue hardship. Human rights legislation sets out the factors that may be considered when determining whether there is undue hardship on an employer or service provider. For example, the

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[110] *Ibid* at para 30.
[111] World Rugby, "Transgender Guidelines", *supra* note 4.
[112] Burke, "Trans women participation in sport", *supra* note 17 at 218.
[113] Ordway et al, "Human Rights and Inclusion Policies for Transgender Women in Elite Sport", *supra* note 11 at 7.

Commission says that only cost, outside sources of funding and health and safety requirements may be taken into account.[114] Furthermore, the standard for providing accommodations must be "as inclusive as possible."[115] In services cases, the consideration of all of the ways to accommodate an individual gets incorporated into the development of the standard or policy.[116] Therefore, when addressing a policy designed to set an appropriate level of risk, a sport organization may be required to show that it has considered all possible ways to accommodate an individual athlete.

Some sport organizations may argue that offering the transgender women and girls the opportunity to compete in men's categories or an "open" category will meet the *Grismer* test of making the accommodation as inclusive as possible. A human rights legal approach would question whether competitive categories that disregard gender, gender identity and gender expression can lead to options that are meaningful, worthy of protection, and can be considered inclusive when the identity and dignity of the individual is at risk. Ordway et al. argue that "[r]egardless of the context of its construction, fairness requires recognition of transgender women as women."[117]

The SCC has noted that a lack of evidence linking a standard to a purpose is sufficient to demonstrate that the threshold had not been met for accommodation.[118] This could be challenging for sport organizations that aim to limit transgender women and girls from participating in the women or girls' category based on fair play or safety. What is the evidence? Are there factors other than chromosomes or hormone levels that go to the issues of athlete safety? Have these factors been considered in setting policies or advancing rule changes? Moreover, the courts have established that failure to accommodate can be proven by a service provider's arbitrary evidence, unreasonable refusals to offer individual assessments, and more.[119] For an employer or service provider to make a claim of reasonable justification, the

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[114] Ontario Human Rights Commission, "Policy on preventing discrimination because of Gender Identity and Gender Expression", supra note 71 at 30-31.

[115] *Grismer*, *supra* note 68 at para 22.

[116] *Ibid* at para 21.

[117] Ordway et al, "Human Rights and Inclusion Policies for Transgender Women in Elite Sport", *supra* note 11 at 8.

[118] *British Columbia (Public Service Employee Relations Commission) v BCGEU ("Meiorin")*, *supra* note 101 at para 77.

[119] *Grismer*, *supra* note 68 at para 22.

accommodation of a transgender athlete must be impossible without undue hardship on the employer or service provider.[120]

The organization is responsible for demonstrating undue hardship.[121] The organization is barred from using impressionistic assumptions, stereotypes,[122] anecdotes or post-facto explanations.[123] Likewise, organizations cannot speculate about the outcome of providing the accommodation.[124] As the Commission stated, any evidence of undue hardship must be real, direct, objective and quantifiable (if costs are involved).[125]

The science of hormones and performance advantage is contentious. Rebecca M. Jordan-Young and Katrina Karkazis noted the deep disagreement among scientists about the role of testosterone in determining athleticism.[126] In the conclusion to their literature review of eight articles that concerned the experience and issues surrounding physical activity and sport participation for transgender people, Bethany Alice Jones et al wrote:

> Within competitive sport, the athletic advantage transgender athletes are perceived to have appears to have been overinterpreted by many sport organisations around the world, which has had a negative effect on the experiences of this population. When the indirect and ambiguous physiological evidence is dissected, it is only transgender female individuals who are perceived to potentially have an advantage as a result of androgenic hormones. Within the literature, it has been questioned as to whether androgenic hormones should be the only marker of athletic advantage or, indeed, if they are even a useful marker of athletic advantage.[127]

If a sport organization is going to argue that its policy excluding transgender women and girls ensures the fairness of a competition, the organization may have to provide the court with scientific evidence through the presentation of experts to support such an argument. In the international

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120 *Ibid* at para 23.

121 *Ibid* at para 42.

122 *Meiorin, supra* note 101 at paras 41 and 78-79 This stringent requirement has also been applied to the following case for objective evidence: see *Miele v Famous Players Inc*., (2000) CHRR D/1 (BCHRT) 37.

123 See *Buttar v Halton Regional Police Services Board*, 2013 HRTO 1578 at para 132.

124 See *Adga Group Consultants Inc v Lane*, 2008 CanLII 39605 (ON SCDC) at para 118.

125 Ontario Human Rights Commission, "Policy on ableism and discrimination based on disability | Ontario Human Rights Commission", (27 June 2016), online: <www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability>.

126 Rebecca M Jordan-Young & Katrina Karkasis, "Athleticism" in *Testosterone: An Unauthorized Biography* (Cambridge, MA: Harvard University Press, 2019) 159. See also Ivy & Conrad, Aryn, *supra* note 28.

127 Bethany Alice Jones et al, "Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies" (2017) 47:4 Sports Med 701–716 at 714.

context, in 2023, the European Court of Human Rights in *Semenya v Switzerland* addressed the World Athletics' Difference in Sex Development (DSD) Regulations requiring women athletes with testosterone above the "normal" range to reduce it to below 5mmol/l for a continuous period of six months before competing in middle distance events.[128] The Court of Arbitration for Sport (CAS) that first heard Semenya's complaint considered the evidence of a concrete advantage in favour of 46 XY DSD athletes in the 1500m and mile competitions to be "sparse", yet it did not suspend the regulations as it had in the earlier *Chand* case.[129] The Swiss Federal Court did not attempt to dismiss the doubts expressed by the CAS. In this way, the European Court of Human Rights held that neither the CAS nor the Swiss Federal Court carried out a thorough examination of the reasons that supported an objective and reasonable justification of the DSD Regulation.[130] It is important at this stage to recall the roots of Canadian human rights law and international human rights law: the dignity of the human being. In assessing evidence in human rights cases, the courts will not be convinced by studies based on discriminatory stereotypes and evidence will be required.[131]

As seen in *Grismer*, it may be difficult to prove undue hardship based on cost.[132] The sport organization would need to prove objectively that the cost of the accommodations would be excessive. As set out above, the Commission has outlined a broad range of factors that organizations should consider in a cost assessment, including the size of the operation and different ways the organization could cover the costs over time. Organizations are obligated to consider any in-kind or outside funding available to support the accommodations and offset costs.[133] Similarly, those

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128 *Semenya v Switzerland, supra* note 29.

129 *Ibid*.

130 *Ibid* at paras 179-184; Pieter Cannoot, "Semenya v Switzerland: Divided ECtHR Significantly Advances the Human Rights Protection for Intersex Athletes (and all professional sportspeople in general) – Part I", (23 August 2023), online: *Oxford Human Rights Hub* <ohrh.law.ox.ac.uk/semenya-v-switzerland-divided-ecthr-significantly-advances-the-human-rights-protection-for-intersex-athletes-and-all-professional-sportspeople-in-general-part-i/> [perma.cc/KTD8-JS29]; Pieter Cannoot, "Semenya v Switzerland: Divided ECtHR Significantly Advances the Human Rights Protection for Intersex Athletes (and all professional sportspeople in general) – Part II", (23 August 2023), online: *Oxford Human Rights Hub* <ohrh.law.ox.ac.uk/semenya-v-switzerland-divided-ecthr-significantly-advances-the-human-rights-protection-for-intersex-athletes-and-all-professional-sportspeople-in-general-part-ii/>. [perma.cc/8GZZ-5889].

131 *Grismer*, *supra* note 68.

132 *Ibid* at para 41.

133 *Ibid*.

seeking the accommodations – in this case, the transgender individual – would be expected to use any available resources that can aid in covering the associated expenses of the accommodation.

Furthermore, health and safety concerns, if present, must be real and significant for an undue hardship claim to stand. The Commission stated that an organization should assess, among other factors described above, how the risk compares to other risks allowed within the organization or already tolerated in society as a whole.[134] This point speaks to the fact that participating in sport creates risk and there may be different tolerance for risk depending on many factors at play. The sport organization should make a reasonable effort to mitigate and reduce risks when present. In this instance, the assessment of undue hardship would include accommodations and precautions taken to reduce risk of injury.[135] Additionally, the sport organization would have to show why it would be unequipped to remedy a safety issue if it were to arise.

C. How Should Service Providers Balance the Competing Rights of Their Clients?

It is possible that the right to accommodation may conflict with the rights of another individual or group, resulting in competing rights. In these competing rights situations, it is a legal requirement for organizations not only to respond, but to take preventative measures to prevent their occurrence.[136]

In a British Columbia Court of Appeal case, a trans woman was refused admission to a training program for a volunteer position at the Vancouver Rape Relief Society (VRRS).[137] VRRS argued that barring the complainant's participation was a *bona fide* requirement given that their services were offered specifically to women who have experienced male-perpetuated violence, and the individual had previously lived life as a male.[138] Despite the organization's apparent discrimination, the Court held that an exception in section 41(1) of the *British Columbia Human Rights Code* addresses

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134 *Ibid* at 31.
135 *Ibid*.
136 *Ibid* at 29.
137 *Vancouver Rape Relief Society v Nixon*, 2005 BCCA 601 at para 1.
138 *Ibid* at para 3.

competing rights shielding the organization from liability in this particular case.[139]

The 2012 Commission policy on competing human rights lays out legal principles and a process for addressing and preventing these types of concerns.[140] The Commission identifies eight legal principles derived from the case law that organizations must consider when dealing with competing rights claims:

1. No rights are absolute;
2. There is no hierarchy of rights;
3. Rights may not extend as far as claimed;
4. The full context, facts and constitutional values at stake must be considered;
5. Must look at extent of interference (only *actual* burdens on rights trigger conflicts);
6. The core of a right is more protected than its periphery;
7. Aim to respect the importance of both sets of rights;
8. Statutory defences may restrict rights of one group and give rights to another.[141]

The Commission's process for addressing competing human rights is summarized in three stages:

Stage One: Recognizing competing rights claims

Step 1: What are the claims about?

Step 2: Do claims connect to legitimate rights?

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[139] *Ibid* at para 9. See *British Columbia Human Rights Code*, RSBC 1996, c 210, s 41 (1) "If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a physical or mental disability or by a common Indigenous identity, race, religion, age, sex, sexual orientation, gender identity or expression, marital status, political belief, colour, ancestry or place of origin, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons."

[140] Ontario Human Rights Commission, *Policy on competing human rights* (2012), online: <ohrc.on.ca/en/policy-competing-human-rights > [perma.cc/T9P3-XR8Z].

[141] *Ibid*.

(a) Do claims involve individuals or groups rather than operational interests?

(b) Do claims connect to human rights, other legal entitlements or *bona fide* reasonable interests?

(c) Do claims fall within the scope of the right when defined in context?

Step 3: Do claims amount to more than minimal interference with rights?

Stage Two: Reconciling competing rights claims

Step 4: Is there a solution that allows enjoyment of each right?

Step 5: If not, is there a "next best" solution?

Stage Three: Making decisions

- Decisions must be consistent with human rights and other laws, court decisions, human rights principles and have regard for [Commission] policy
- At least one claim must fall under the Ontario *Human Rights Code* to be actionable at the Human Rights Tribunal of Ontario.[142]

Sport organizations can use these questions to guide their decisions when they are faced with competing rights claims among athletes.

The 2020 Australian Football League (AFL) Gender Diversity Policy for Elite Football created its own process for examining each individual application of a transgender woman to play at the elite levels.[143] The process anticipates competing claims between transgender women and cis-gender women, although Burke points out that those competing claims should not be assumed.[144] In order to play at the elite levels of women's Australia Rules Football, applicants must provide information about their testosterone levels; their height, weight and results of tests of strength and speed. The AFL may refuse the application if either or both of the following criteria are satisfied:

(1) considering the data collected on testosterone levels, height, weight, speed and strength, and evidence of a significant difference or competitive advantage, there is a relevant and significant disparity in the applicant's

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142 *Ibid*.
143 Australian Football League, *Gender Diversity Policy: Elite Football* (AFL, 2020).
144 Burke, "Trans women participation in sport", *supra* note 17.

> strength, stamina or physique when compared to data procured from cisgender players in the preceding two seasons of the competition;
>
> (2) there is an unacceptable safety risk from the applicant's potential participation in the competition.[145]

The policy goes on to state that if the committee finds that there may be an unacceptable safety risk, it must undertake a risk assessment, noting:

> (1) unacceptable safety risks will likely arise only in exceptional circumstances and will not arise simply from the proposed participation of a gender diverse person in an elite competition;
>
> (2) exceptional circumstances may arise where there is a significant disparity in the applicant's physique as compared to that of cisgender players in the relevant competition (noting that data may be limited in respect of competitions that sit below the elite levels football); and
>
> (3) the risk assessment must, amongst other things, consider whether the rules applicable to the relevant elite level are unable to safely manage the risks arising from the proposed participation of the gender diverse person.[146]

While the AFL policy sets out a process to examine the context of a transgender woman competing in elite Australia Rules Football, Ordway et al challenge the policy as relying on incomplete information, stereotypes, and the absence of human rights in its framework. For example, the AFL Women's does not publicly provide statistics on the height and weight of its players, but an analysis of other leagues shows a vast range of athlete height and weight.[147] The AFL's reliance on testosterone ignores evidence of variations of levels in males and females with significant overlap between sexes.[148] Furthermore, Ordway et al argue that this puts the onus on transgender athletes to demonstrate that they do not have a competitive advantage.[149]

As stated above, in Canadian law, once a complainant has proven a *prima facie* case of discrimination, the burden shifts to the respondent to prove a *bona fide* justification. Furthermore, the justification must not be based on impressionistic assumptions or stereotypes. Although the AFL policy looks

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[145] *Australian Football League*, *supra* note 143 at 13.
[146] *Australian Football League*, *supra* note 143.
[147] Ordway et al, "Human Rights and Inclusion Policies for Transgender Women in Elite Sport", *supra* note 10 at 11.
[148] *Ibid* at 12.
[149] *Ibid*.

at the context of the individual athlete, it is not clear that it would meet the requirements of a *bona fide* justification in Canada.

D. Other Possible Defences to Policies That Establish *Prima Facie* Discrimination

Many human rights statutes contain exclusions or exemptions to policies that establish *prima facie* discrimination. The *OHRC* establishes in section 18 that "special interest organizations" can offer services that discriminate on the basis of protected grounds.[150] These organizations include charities, schools, social clubs and fraternities that want to limit their membership. Although the *OHRC* once included athletic participation in such exclusions under section 19, this provision was deemed unconstitutional in 1986.[151] What remains is section 20, which states that the use of services or facilities may be restricted "to persons of the same sex on the ground of public decency."[152]

Provinces across the country have other limitations and exceptions in place. The *Saskatchewan Human Rights Code* allows the Lieutenant Governor in Council or an appointed committee to create exemptions to their grounds of discrimination.[153] In British Columbia, the *Human Rights Code* allows charitable, philanthropic, educational, fraternal, religious or social organizations that do not operate for-profit, and promote the best interests of an identifiable group under a protected ground, to discriminate.[154] Moreover, the *Canadian Human Rights Act* exempts "special programs" from contravening the *Act*, provided they improve opportunities for a disadvantaged group.[155] Each case must be analyzed with the appropriate statute in mind.

Provisions labelled as "affirmative action" may present a risk to the inclusion of transgender women and girls in women and girls sport categories. These policies can be found in almost all human rights statutes across the country, such as section 11 of the *Manitoba Human Rights Code* and section 10 of the *Alberta Human Rights Act*. Where sub-groups are exempted

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150 *Ontario Human Rights Code*, *supra* note 64.
151 *Blainey v Ontario Hockey Association*, 1986 OJ 236 (Ont CA) at para 62.
152 *Ontario Human Rights Code*, *supra* note 64, s 20 (1).
153 *Saskatchewan Human Rights Code*, 2018 7 c S-24.2, s54(b).
154 *British Columbia Human Rights Code*, RSBC 1996, c 210, s 41.
155 *Canadian Human Rights Act*, RSC 1985, c H-6, s 16.

from contravening human rights legislation, it is unclear whether the individual member of the sub-group making a claim or the organization determines in which identity or category they are placed.[156] The Federal Court of Appeal noted that although each legislature has enacted its own limiting provisions, the same end is desired: "the essential aim of the wording is to forbid discrimination by enterprises which purport to serve the public".[157] While a sport organization may argue that women's and girls' categories improve the situation of a disadvantaged group, they would likely have to prove, with evidence, why the participation of transgender women and girls would pose an actual, not theoretical, threat to such programs.

V. Conclusion

Dignity lies at the heart of a human rights legal analysis. When assessing a sport organization's policy regarding the conditions under which transgender women and girls' participation in a sport may be restricted, the courts in Canada will apply the tests set out in human rights statutes and the governing case law in ways that respect the dignity of the people affected. This means that the courts will require that the policy have a legitimate purpose, one that is based on the furtherance of the mission of the organization, but not one that is based on discriminatory stereotypes or oppressive norms. The restrictions in the policy will have to be tailored to its purpose so that the restrictions do not go beyond what is necessary to achieve the policy's goals. And in attempting to justify a restriction as *bona fide* based on cost, safety or fairness concerns that go to the heart of the organization's purpose or the service provided, the organization will need to introduce evidence that is accepted by the court on a balance of probabilities. Without evidence, the *bona fide* justification defence will fail.

The question thus remains, with the scientific evidence available, whether it will be possible to demonstrate that transgender women, using testosterone suppression or not, have a significant performance advantage over cisgender women in any particular sport. And, if there is no performance advantage and the organization in question has no other policy regulating the height, weight and strength of all athletes, it seems unlikely

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156 Lori Chambers, "Unprincipled Exclusions: Feminist Theory, Transgender Jurisprudence, and Kimberly Nixon" (2007) 19 Cndn. Jrnl of Wmn and the Law at 323.

157 *Rosin*, *supra* note 91 at para 9.

that the organization can justify a restrictive policy based on safety risk. If that is so, in the absence of proven performance advantage and safety risk, competing rights claims made by some cisgender women athletes would fall away.

Courts have incorporated the concept of dignity into human rights inquiries in many ways, including by insisting on analytical rigor. Restrictions based on prohibited grounds of discrimination, such as gender identity, can only be justified after in-depth analysis of a policy's purpose, effect, and whether the exclusion of an individual or group is rationally justified in the circumstances. Arbitrary policies or those based on discriminatory norms will not be allowed. Respect for dignity requires that courts hear the case and learn about the social context in which the individual lives, works and plays. Courts are likely to consider the history of oppression that transgender and gender diverse individuals have endured when deliberating on the purpose of any restrictions. To assess whether an exclusionary policy violates human rights law, the courts may conduct a close inspection of the organization's rules within the context of its sport. Using a contextual analysis, as set out in the legal tests, for determining whether an individual or group has been subject to discrimination in ways that violate human rights law can elevate the importance of dignity in the discourse.

There is much work that remains, as sport organizations, together with their athletes, review eligibility policies. My hope is that this article will assist in these important projects and bring human rights laws to the centre of the field.