Finding A Way Forward: Addressing Organizational Factors Contributing to Systemic Maltreatment in Canadian Sport

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ABSTRACT

A range of investigations and empirical research confirms the scope and depth of maltreatment across sport. Legal liability for maltreatment in social institutions, such as sport organizations, has traditionally focused on the direct actions of the individual wrongdoer who perpetrates abuse and on the indirect or vicarious liability of the organization for its failure to control or mitigate the risk of such harm. The organization was positioned as well-meaning but deceived by the predator who was able to slip through the organizational cracks. A limitation of this traditional framework of liability is that it does not consider the power of the sport organization in shaping the conduct of individuals who are capable of engaging in maltreatment due to their positions of authority. Research shows that organizational factors play a critical role in contributing to maltreatment within sport organizations. In many, if not most cases, these factors are embedded in the structure and operations of sport organizations and are symptomatic of a failed sport system. It is therefore necessary to develop measures to address them in order to combat maltreatment at all levels of Canadian sport. This

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paper analyzes two avenues of recourse used to address maltreatment in Canadian sport – specifically, an independent national body with contractual authority to receive, investigate and adjudicate violations of a universal code of conduct, and class action lawsuits filed by athletes against sport organizations based on the tort of systemic negligence – and whether these avenues effectively address the systemic organizational factors that contribute to maltreatment. Based on this analysis, the paper examines whether there needs to be a transformative paradigm shift in how sport is regulated in Canada in order to address these systemic organizational factors and whether a public inquiry is the ideal catalyst for such paradigmatic change. The paper concludes with a theoretical framework and suggested options for regulatory reform at the federal, provincial and territorial levels involving governments and administrative authorities, based on examples in other jurisdictions and sectors.

KEYWORDS: *Maltreatment in Sport*; *Safe Sport*; *Code of Conduct*; *Independent Investigation and Adjudication*; *Tort Liability*; *Systemic Negligence*; *Class Actions*; *Public Inquiry*; *Regulatory Reform*

1. INTRODUCTION

A range of investigations and empirical research confirms the scope and depth of maltreatment across sport.[1] Within the Canadian

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1 See, for example, Ashley E. Stirling, "Definition and constituents of maltreatment in sport: establishing a conceptual framework for research practitioners" (2009) 43 British Journal of Sports Medicine 1091; Erin Willson, Gretchen Kerr, Ashley Stirling, et al., "Prevalence of Maltreatment Among Canadian National Athletes" (2022) 37:21-22 Journal of Interpersonal Violence NP198857 [Willson et al]; US Center for Safesport, "2020 Athlete Culture and Climate Survey" (last accessed 29 December 2023), online: <https://uscenterforsafesport.org/wp-content/uploads/2021/07/> [https://perma.cc/L8HX-J7FV]; Joe Tucci & Janise Mitchell, "Safeguarding Children in Sport: A national blueprint to build the capacity of sport to protect children and young people from abuse, harm and exploitation", online: Australian Childhood Foundation <https://www.childabuseroyalcommission.gov.au/sites/default/files/ASC.0003.001.0001.pdf> [https://perma.cc/H2Q9-KLFF]; Human Rights Watch, "I Was Hit So Many Times I Can't Count: Abuse of child athletes in Japan" (2020), online: <https://www.hrw.org/report/2020/07/20/i-was-hit-so-many-times-i-cant-

sport system there have been protracted efforts to address the issue. Indeed, that Canadian sport is in crisis was recognized long ago.[2] What has become clear is that the sport system itself is broken and that the prevalence of maltreatment is symptomatic of system-wide issues. Both historical and current incidents of maltreatment continue to come to light despite efforts to implement various remedial measures.

From a legal perspective, responsibility for abuse occurring within social institutions, such as sport organizations, has traditionally focused on the direct actions of the individual wrongdoer who perpetrates such abuse and on the indirect, or vicarious liability of the organization for its failure to control or mitigate the risk of such harm.[3] The organization was positioned as well-meaning but deceived by the predator who was able to slip through the organizational cracks. The organization is the "honey pot"; that is, certain characteristics of the organization act as a draw or magnate for the bad actor.[4] This framework for establishing legal liability is reflected in the screening, educational, and code of conduct initiatives that have been implemented in Canadian sport, which largely focus on preventing and addressing *individual* misconduct.

More recently, however, there has been a growing recognition that this individual-specific approach to incidents of abuse within the sport organization seriously underestimates the power of the organization in

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count/abuse-child-athletes-japan> [https://perma.cc/SD4G-S8LX]; Margo Mountjoy, Celia Brackenridge, Malia Arrington, et al., "International Olympic Committee Consensus Statement: Harassment and abuse (non-accidental violence) in sport" (2016) 10:17 British Journal of Sports Medicine 1019 [Mountjoy et al].

2 Lori Ward & Jamie Strashin, "Sex offences against minors: Investigation reveals more than 200 Canadian coaches convicted in last 20 years" (last accessed 29 December 2023), online: CBC <https://www.cbc.ca/sports/amateur-sports-coaches-sexual-offences-minors-1.5006609> [https://perma.cc/A7LJ-JYML]; Gretchen Kerr, Bruce Kidd & Peter Donnelly, "One step forward, two steps back: The struggle for child protection in Canadian sport" (2020) 9:5 Social Sciences 68 [Kerr, Kidd & Donnelly]; Curtis Fogel & Andrea Quinlan, *Sexual Assault in Canadian Sport* (Vancouver: UBC Press, 2023).

3 Margaret Hall, "After Waterhouse: Vicarious Liability and the Tort of Institutional Abuse" (2000) Journal of Social Welfare & Family Law 159; Rachael Baillie, "A Square Peg in a Round Hole: Reshaping the Approach to Systemic Negligence in the Modern Public Service" (2014) 20 Auckland University Law Review 45.

4 Margaret Hall, "Institutional Tort Feasors: Systemic Negligence and the Class Action" (2006) 2 Torts Law Journal 135 at 141.

shaping the conduct of individuals who are capable of engaging in maltreatment due to their positions of authority. Research shows that organizational factors play a critical role in both enabling and motivating abuse within sport organizations.[5] Due to the ubiquitous nature of these organizational factors across sport, sport organizations and the sport system as a whole have failed to address maltreatment from a system-wide perspective.

This paper examines the self-regulating nature of the Canadian sport system and how it has been unable or unwilling to identify and correct the systemic organizational issues that contribute to maltreatment in order to meet its fundamental duty of care to ensure the safety of participants. The paper consists of several subsequent sections. Section 2 discusses the prevalence of maltreatment in sport with a focus on the organizational issues that have been identified as risk factors for maltreatment. Section 3 examines the self-regulatory nature of the Canadian sport system and how attempts by national, provincial, and territorial sport organizations and federal, provincial, and territorial governments to address maltreatment on a system-wide basis have been limited or flawed. Section 4 discusses the independent complaint management and civil litigation pathways that provide individualized redress for victims and survivors of maltreatment in sport, but do not fully address the systemic organizational issues plaguing sport. Section 5 discusses a movement from various sectors of the sport community calling for a public inquiry into the maltreatment of athletes in sport and how a public inquiry is better suited than other types of review to identify novel strategies to address the organizational issues that contribute to maltreatment at all levels of Canadian sport, including new regulatory systems for sport. Section 6 considers a transformative paradigm shift in the regulatory structure of sport to make sport organizations more accountable for ensuring the safety of participants and bring greater cohesion amongst the various safe sport investigative, adjudicative and oversight initiatives that exist in Canada. The final section offers concluding remarks.

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5 Victoria Roberts, Victor Sojo & Felix Grant, "Organisational factors and non-violence in sport: A systemic review" (2020) 23:2 Sport Management Review 8 [Roberts et al].

2. Definition, Prevalence, and Risk Factors of Maltreatment

Maltreatment in sport is not new, indeed, it has been an open secret of sport for decades. Over the past decade, however, a global awareness has emerged highlighting how deeply maltreatment – including physical, sexual, and psychological abuse – is enmeshed in the culture of sport. Through a substantial body of research, reports and inquiries, a picture has emerged of the nature and extent of such maltreatment as well risk factors that typically underlie sport organizations characterized by a culture of maltreatment.[6]

2.1. Definition of Maltreatment

Views of maltreatment have broadened to include different categories of abuse and mistreatment, including sexual abuse, physical abuse, psychological abuse, and neglect, as well as various types of harassment, bullying and hazing.[7] Each of these categories of maltreatment has been detailed elsewhere, along with descriptions of the harm.[8]

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6 See for example: United Nations Office on Drugs and Crime (UNODC), "Global Report on Corruption and Abuse in Sport, Section 7: Corruption and Abuse in Sport" (last accessed 29 December 2023), online: <https://www.unodc.org/res/safeguardingsport/grcs/section-7_html/SPORTS_CORRUPTION_2021_S7>; Anne Whyte, QC, "Whyte Review" (last accessed 29 December 2023), online: Sport England and UK Sport <https://www.sportengland.org/guidance-and-support/safeguarding/whyte-review> [https://perma.cc/MTA6-Q6WH]; Australian Human Rights Commission, "Change the Routine: Report on the Independent Review into Gymnastics in Australia" (last accessed 29 December 2023), online: <https://humanrights.gov.au/our-work/sex-discrimination/publications/change-routine-report-independent-review-gymnastics> [https://perma.cc/2ZPC-8KUB]; Sally Q. Yates, "Report of the Independent Investigation to the U.S. Soccer Federation Concerning Allegations of Abusive Behavior and Sexual Misconduct in Women's Professional Soccer" (Yates Report) (last accessed 29 December 2023), online: King and Spalding <https://www.kslaw.com/attachments/000/009/931/original/King___Spalding_-_Full_Report_to_USSF.pdf?1664809048> [https://perma.cc/D65L-F7KX]; Willson et al, *supra*, note 1.

7 Stirling, *supra* note 1; Willson et al, *ibid*.

8 See Stirling, *ibid*; Roberts et al, *supra* note 5; Willson et al, *ibid*; Misia Gervis & Nicola Dunn, "The emotional abuse of elite child athletes by their coaches" (2004) 13:3 Child Abuse Review 215; K. Alexander, A. Stafford A & Ruth Lewis, *The experiences of children*

2.2. Prevalence of Maltreatment

Prevalence studies highlight how deeply various forms of maltreatment are embedded in the culture of sport. For example, in the case of Canadian national team athletes, Willson and her colleagues[9] report neglect and psychological maltreatment as the most frequently reported with 68.8% and 60.2% of athletes reporting at least one such harmful behaviour, respectively, followed by sexual and physical maltreatment with 20.5% and 14.3% of athletes reporting one such harmful behaviour, respectively.[10] As the authors note, these findings are consistent with other national scale studies conducted in the United Kingdom, Belgium and the Netherlands.[11] Incidents of maltreatment cut across virtually any ground including age, race, sexual orientation, religion, disability, culture, socio-economic status, and athletic ability. Some groups, however, are more at risk than others,

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participating in organised sport in the UK (Edinburgh: The University of Edinburgh/NSPCC Child Protection Research Centre, 2011); Tine Vertommen, Nicolette Schipper-van Veldhoven, Kristien Wouters, et al., "Interpersonal violence against children in sport in the Netherlands and Belgium" (2016) 51 Child Abuse & Neglect 233-236 ["Vertommen et al"]. In particular, each of these categories of abuse has been incorporated into and elaborated upon as part of the Universal Code of Conduct to Prevent and Address Maltreatment in Sport adopted by national sport organizations in Canada: Office of the Sport Integrity Commissioner, "Universal Code of Conduct to Prevent and Address Maltreatment in Sport" (last accessed 29 December 2023), online: <https://sportintegritycommissioner.ca/uccms> [https://perma.cc/8KKJ-9NXW] [UCCMS].

9 Willson et al, *ibid*.

10 Variations in prevalence rates between studies are a result of a number of factors, including different measures, inconsistency in terminology used to define harm or abuse, the characteristics of the samples examined (e.g., level of sport, age of participants, etc.) and methodological approach: see, generally, Tine Vertommen & Sylvie Parent, "Measuring the prevalence of interpersonal violence against children in sport," in *Routledge Handbook of Athlete Welfare*, 1st edition (London: Routledge, 2020), 389-393; Melanie Lang, Lut Mergaert, Catarina Arnaut, et al., "Gender-based violence in sport: prevalence and problems" (2022) 20 European Journal for Sport and Society 57.

11 Willson et al, *supra* note 1. These findings are also consistent with a more recent study of 10,000 participants in Austria, Belgium, Germany, Romania, Spain, and the United Kingdom: see Mike Hartill, Bettina Rulofs, Marc Allroggen, et al., "Prevalence of interpersonal violence against children in sport in six European countries" (2023) 146 Child Abuse & Neglect.

including women, children, racialized minorities, individuals with disabilities, and individuals who identify as 2SLGBTQI+.[12]

2.3. Organizational Characteristics Underlying Maltreatment

Understanding how maltreatment occurs across sport is challenging – no single explanation is sufficient and no single factor, or even several factors, is dispositive.[13] Past focus has largely been on the individual factors, primarily those relating to the perpetrator,[14] or 'bad apple', who infiltrates the organization and is responsible for the maltreatment. Increasingly, attention has turned to the organization itself as it becomes clear that certain characteristics of an organization cannot only create an environment prone to maltreatment but can actively enable and perpetuate the maltreatment.[15] A number of risk factors associated with institutional characteristics have emerged from the research as particular 'red flags' for organizations prone to incidents of maltreatment. These characteristics do not guarantee maltreatment within an organization, but they do point to conditions within which it can develop and thrive. They also describe a number of systemic features of the sport system.

Two factors that are consistently reported in the literature and are described by Roberts et al.[16] as necessary, though not sufficient, antecedents to maltreatment in sport. The first is the power differential or dependency

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12 Vertommen et al, *supra* note 8; Mountjoy et al, *supra* note 1; Willson et al, *ibid*; UNODC, *supra* note 6.

13 Maltreatment comes as a confluence of individual factors, sport cultural factors and organizational factors: John Krieger & Lindsay Parks Pieper, "Athlete Perceptions of Governance-Related Issues to Sexual Abuse" (2023) 12:3 Social Sciences 141 [Krieger & Pieper]; see also Roberts et al, *supra* note 5.

14 Alternatively, the victim or survivor of maltreatment may be the focus: see Ralph E. Schmidt, Andres R. Schneeburger, & Malte C. Claussen. "Interpersonal violence against athletes: What we know, what we need to know, and what we should know" (2022) 1:2 Sports Psychiatry: Journal of Sports and Exercise Psychiatry 78–84 [Schmidt et al].

15 See, generally, Calvin Nite & John Nauright, "Examining institutional work that perpetuates abuse in sport organizations" (2020) 23:1 Sport Management Review 117 [Nite & Nauright]; Roberts et al, *supra* note 5.

16 Roberts et al, *ibid* at 22-24.

relationship between parties (i.e., a *power imbalance*),[17] which is typically embedded within the hierarchical structure of sport where one party has control over both strategic and valuable resources that are depended upon by another more vulnerable party. Without the power imbalance, the stronger party may not have the leverage to engage in acts of maltreatment and the weaker party may be able to counteract any potential maltreatment.[18] The second factor is a culture of organizational tolerance of inappropriate or abusive behaviour, due to inadequate *policies and enforcement* of those policies. [19] According to Roberts et al., "[f]ailure to establish formal standards of acceptable conduct and enforce [these] standards at the highest level of the sport organisation, results in *de facto* informal norms facilitated through modelling of abusive behaviour."[20] These behaviours, which are conducive to and enabling of maltreatment, become normalized and viewed as a legitimate way to operate within the sport organization. For example, complaints about maltreatment may be ignored or minimized, abusive coaching techniques are accepted and even vaunted, and any opposition to the organization's handling of maltreatment is silenced or denigrated.

Additional institutional factors can be identified that operate as enablers of maltreatment. These factors relate to *relationship structures* (e.g., constructed environments in which the most vulnerable have limited

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17 See Krieger & Pieper, *supra* note 13 at 8; Roberts et al, *ibid* at 22-24; Nite & Nauright, *supra* note 15 at 126. Accounts of institutional abuse suggest that certain institutional characteristics are more likely to foster abusive behaviours than others. Three characteristics are repeatedly associated with a toxic culture of abuse: secrecy and isolation; the existence of a power or dependency relationship; and the existence of a dominant hierarchical structure increasingly centralizing power in an elite group: Hall, *supra* note 3 at 162; Baillie, *supra* note 3 at 53; Marianne Cooper, "The Three Things That Make Organizations More Prone to Sexual Harassment" (last accessed 29 December 2023), online: The Atlantic <https://www.theatlantic.com/business/archive/2017/11/organizations-sexual-harassment/546707/> [https://perma.cc/98JM-GH5J].

18 Roberts et al, *supra* note 5 at 13.

19 Krieger & Pieper, *supra* note 13; Roberts et al, *ibid*; Alison Taylor "What do corrupt firms have in common? Red flags of corruption in organizational culture" (last accessed 29 December 2023), online: Center for the Advancement of Public Integrity, Columbia Law School <https://scholarship.law.columbia.edu/public_integrity> [https://perma.cc/4HAR-VBJP].

20 Roberts et al, *ibid* at 22.

control and are isolated,[21] a lack of meaningful athlete representation in decision-making roles,[22] and decision-makers' lack of democratic accountability to athletes, which adds to the imbalance of power between the sport organization and athletes[23]), *governance* (e.g., conflicts of interest of those in governance or management roles within and across organizations that have a chilling effect on an athlete's reporting of maltreatment and make the organization less inclined to identify certain behaviours as forms of maltreatment that need to be addressed and prevented,[24] and a lack of diverse, independent, and qualified directors and officers[25]), and *ideologies* (e.g., the prioritization of performance over athlete well-being[26] and a win-at-all-cost ethos, reinforced where funding and other such rewards are tied to success[27]).

Anecdotal evidence of athletes documenting their experiences with maltreatment overwhelmingly point to these organizational flaws relating to power imbalances, policies and enforcement, relationship structures, governance, and ideologies.[28] In many, if not most cases, these issues are

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21 Hall, *supra* note 3 at 162; Hall, *supra* note 4 at 5; Roberts et al, *ibid* at 21.

22 See generally Kerr, Kidd & Donnelly, *supra* note 2; Lucie Thibault, Lisa Kihl & Kathy Babiak, "Democratization and governance in international sport: addressing issues with athlete involvement in organizational policy" (2020) International Journal of Sport Policy and Politics 275; Willson et al, *supra* note 1.

23 Krieger & Pieper, *supra* note 13 at 10.

24 Willson et al, *supra* note 1; Kreiger & Pieper, *ibid* at 10.

25 Thomas Cromwell, "Final Report Hockey Canada Governance Review" (last accessed 29 December 2023), online: Hockey Canada <https://cdn.hockeycanada.ca/hockey-canada/Corporate/action-plan/downloads/2022-hockey-canada-governance-review-final-report-e.pdf> [https://perma.cc/9UWB-ZCUD] [Cromwell].

26 Erin Willson, Gretchen Kerr, Anthony Battaglia, et al., "Listening to Athletes' Voices: National Team Athletes' Perspectives on Advancing Safe Sport in Canada" (2022) 4 Frontiers in Sports and Active Living, Section Sports Management, Marketing, and Economics [Willson et al]; Roberts et al, *supra* note 5 at 20.

27 Peter Donnelly, "Autonomy, Governance and Safe Sport" in Julie Stevens, ed, *Safe Sport: Critical Issues and practices* (St. Catharines: Ecampus Ontario, 2022); Willson et al, *ibid*.

28 Most anecdotal evidence comes from high performance athletes at the national level. Athlete perceptions of maltreatment in sport are not well documented at the grass roots or youth sports levels.

embedded within the structure and processes of sport organizations and are symptomatic of a failed sport system.

3. SELF-REGULATORY NATURE OF SPORT

In general, sport organizations have been unwilling or unmotivated to self-identify and self-correct the organizational factors described in section 2 that contribute to systemic maltreatment in sport. This inaction is linked to a sport organization's autonomous authority to govern itself, its members, and its activities, largely free from outside influence. Without external influence, the sport organization is not compelled to change the *status quo* in relation to how it governs or operates. A sport organization's autonomy originates from the grassroots beginnings of organized sport whereby individuals voluntarily formed associations to pursue a common activity – that is, to play sport with uniform rules in organized settings. These private associations created, administered, and enforced their own rules without the need for government recognition or involvement. Over time, as participation in sport increased and spread geographically, these private associations began to organize themselves into a hierarchy of organizations: local clubs became members of a regional organization, each regional organization became a member of a national organization, and each national organization became a member of an international organization. The globalization of sport, including the popularity of international sport events, such as the Olympic Games, has only strengthened this hierarchy and the regulatory autonomy of the organizations within it.[29] This insulated hierarchical system does not encourage a sport organization to critically examine its culture, governance, or operations, particularly where the organization is financially healthy and able to carry out its mission to deliver sport activities and competitions for participants. The sport organization is not motivated or compelled to compare itself to other social institutions because the sport system regards itself as unique and possibly exempt from the norms and standards that apply to other areas of society. If the sport organization views itself as accountable to anyone, it is the higher-level sport

[29] Particularly, at the international level where organizations such as the International Olympic Committee and international sport federations often claim to be outside the reach of national legal systems: see Marcus Mazzucco & Hilary Findlay, "The Supervisory Role of the Court of Arbitration for Sport in Regulating the International Sport System" (2010) 1:2 International Journal of Sport and Society 131.

organization to which it belongs and its own members, which are typically lower-level sport organizations and not athletes or the public at large.[30] This insulation of the sport system has also deterred governments from exercising regulatory oversight or control over sport organizations, due to the perception that sport is a private sector domain that the government may fund (for the interests of its citizens who participate in sport) but should not regulate.[31]

In Canada, the hierarchical sport system consists of national sport organizations (NSOs), provincial and territorial organizations (PTSOs), and local clubs.[32] Each private organization is tasked with governing its sport at its respective regional level, in accordance with its rules and any rules set by the higher-level organization of which it is a member.[33] In theory, this hierarchical structure could disrupt the regulatory autonomy described above by making a sport organization subject to the authority or oversight of a higher-level organization. The hierarchical structure allows a higher-level organization to exercise jurisdictional authority over lower-level organizations, directly or indirectly. For example, an NSO could exercise *direct* jurisdictional authority over its PTSO members, as well as *indirect* jurisdictional authority over local clubs, provided that the indirect authority is exercised through the PTSOs that have the direct relationship with local

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30 Athletes are typically only members of local clubs.

31 The degree of separation between government and sport organizations varies depending on the jurisdiction: see Stephanie De Dycker, "Good governance in Sport: comparative law aspects" (2019) 19 International Sports Law Journal 116.

32 Parallel or intersecting systems of organization can exist in Canadian amateur sport. For example, some systems of organization can flow from an organization that hosts a particular competition, such as the Commonwealth Games, World University Games, or a more regional or local competition, such as a national, provincial or territorial association of school athletic programs. The organization that hosts these competitions will have its own member organizations, and those member organizations may, in turn, have their own members. However, these parallel systems often intersect with the main amateur sport hierarchy as the coaches, athletes, and technical rules of the sport are from the main hierarchy that consists of local sport organizations, PTSOs, NSOs, and international sport federations: Hilary Findlay, *Legal Aspects of Sport and Recreation* (Toronto: Emond Montgomery Publications Limited, 2022) 176.

33 For example, an NSO is a member of an international and/or continental sport federation, a PTSO is a member of the NSO, and the local level sport organization is a member of the PTSO. The rules of an organization are binding on its member organizations as a matter of contract law.

clubs.[34] In practice, however, this direct and indirect jurisdictional authority is rarely exercised by NSOs and PTSOs in Canada resulting in a lack of harmonization and coordination in safe sport measures. Because of this, the sport system itself has been unable to address maltreatment at all levels of sport, making it necessary for governments to play a role.[35]

Federal, provincial and territorial governments in Canada are not involved in the day-to-day administration of sport or the operation of sport organizations.[36] Instead, the role of governments is largely limited to providing funding to sport organizations.[37] The federal government (specifically, the branch of Sport Canada within the Department of Canadian Heritage) provides funding to NSOs and multi-sport organizations that operate at the national level.[38] Similarly, provincial and territorial governments (through their sport ministries or funding agencies) provide funding to PTSOs.[39] Although governments have attempted to use this funding authority to oversee or control sport organizations, the approach is distinct from a state-sanctioned regulatory scheme that provides

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34 Findlay, *supra* note 32.

35 Richard McLaren, Bob Copeland & Diana Tesic, "Final Report on Independent Approaches to Administer the Universal Code of Conduct to Prevent and Address Maltreatment in Sport in Canada" (last accessed 29 December 2023) at 1, online: The Sport Information Resource Centre <https://sirc.ca/wp-content/uploads/2020/12/MGSS-Report-on-Independent-Approaches-December-2020-rev.pdf> [https://perma.cc/S4MD-YQPA] [McLaren, Copeland & Tesic].

36 As an exception, municipal governments may administer local sport and recreation programs; however, such programs operate outside of the main hierarchical system of organizations for amateur competitive sport that consist of NSOs, PTSOs, and local sport organizations.

37 The government's role is broader in the case of combative sports due to criminal law provisions that prohibit "prize fights" and authorize provincial and territorial governments to sanction or license professional and amateur combative sport events under an exemption to the prohibition: *Criminal Code*, RSC 1985, c C-4, s 83 [*Criminal Code*].

38 This public funding partially subsidizes the operations and activities of the recipient sport organization and its lower-level member organizations.

39 Sport organizations at all levels are also funded through user fees paid by participants of the sport.

a public regulator with coercive powers over sport organizations, such as a licensing scheme authorized by legislation.[40]

The following sections explore how these two key features of Canada's sport system – that is, the lack of jurisdictional authority exercised by higher-level sport organizations and the limited funding role of government – have acted as barriers to addressing maltreatment at all levels of Canadian sport, including the systemic organizational factors described in section 2.

3.1. Jurisdictional Role of NSOs and PTSOs

Higher-level sport organizations, such as NSOs and PTSOs, are often unwilling or incapable of exercising their direct and indirect jurisdictional authority to regulate lower-level member organizations – particularly in relation to maltreatment in sport. This lack of regulatory oversight by higher-level organizations in the sport hierarchy is due to several contributing factors.

First, higher-level organizations themselves have not historically had clear rules that prohibit maltreatment or that address the organizational factors linked to maltreatment, such as structural power imbalances, the lack of an independent process to enforce standards of conduct, conflicts of interest in governance or administration, lack of athlete involvement in decision-making, and a winning-at-all-costs mentality.[41] The Universal Code of Conduct to Prevent and Address Maltreatment in Sport (UCCMS) represents the first attempt to clearly define and prohibit different forms of maltreatment uniformly across sports in Canada.[42] Although the UCCMS

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40 For example, the government's direct regulation of long-term care homes and hospitals: see *Fixing Long-Term Care Act, 2021*, SO 2021, c 39, Sched 1; *Public Hospitals Act*, RSO 1990, c P.40.

41 Marcus Mazzucco, "Using the Convention on the Rights of the Child to protect children in Canadian sport" in Celia Brackenridge, Tess Kay & Daniel Rhind, eds, *Sport, Children's Rights and Violence Prevention: A Sourcebook on Global Issues and Local Programmes* (London: Brunel University Press, 2012) 63; Peter Donelly & Gretchen Kerr, "Revising Canada's Policies on Harassment and Abuse in Sport: A Position Paper and Recommendations" (last accessed 29 December 2023), online: University of Toronto <https://kpe.utoronto.ca/sites/default/files/harassment_and_abuse_in_sport_csps_position_paper_3.pdf> [https://perma.cc/M7BS-FVPV] [Donnelly & Kerr].

42 Notably, the first iteration of the UCCMS was not a product of any NSO or even the sport system itself. Rather, it was a collaborative development involving sport

is a positive step forward to establish an enforceable code of conduct in sport, not all NSOs require their lower-level organizations to adopt the UCCMS, leaving a gap at the provincial, territorial and local levels of sport where there is a greater risk of maltreatment due to the greater number of participants.[43] As discussed further in section 4.1 of this paper, the UCCMS also does not address any of the organizational factors contributing to maltreatment – aside from the factor relating to having formal standards of acceptable conduct. Instead, a separate initiative has been developed by the sport system to address certain organizational risk factors for maltreatment – specifically, the Canadian Olympic Committee (COC)'s Canadian Sport Governance Code that includes standards for avoiding conflicts of interest and increasing athlete representation in an organization's decision-making structures.[44] However, the Canadian Sport Governance Code has not been widely implemented by NSOs and NSOs have not required lower-level sport organizations to adopt it.

A second factor that limits the exercise of jurisdictional authority by higher-level organizations is that NSOs (and PTSOs) often lack the resources

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organizations, athlete advocates, scholars, and government: Sport Information Resource Centre, "Universal Code of Conduct to Prevent and Address Maltreatment in Sport (UCCMS) - UCCMS Leadership Group - Terms of Reference" (last accessed 1 January 2024), online: <https://sirc.ca/wp-content/uploads/2020/05/ToR-UCCMS-Leadership-Group-May-2020-FINAL-Eng.pdf> [https://perma.cc/D6YQ-LLF3].

43 See McLaren, Copeland & Tesic, *supra* note 35. As an exception, Volleyball Canada has ensured that its PTSOs and local volleyball organizations have adopted the UCCMS: Donna Spencer, "Sports integrity commissioner says safe sport gaps exposed in 1st year of office" (last accessed 29 December 2023), online: CBC <https://www.cbc.ca/sports/sports-integrity-commissioner-says-safe-sport-gaps-exposed-1.6952865#:~:text=Sports-,Sports%20integrity%20commissioner%20says%20safe%20sport%20gaps%20exposed%20in%201st,doesn't%20extend%20far%20enough> [https://perma.cc/83GB-QBFE].

44 The COC created the Canadian Sport Governance Code in November 2020. Its purpose is to "improve organizational performance by encouraging national sport organizations to upgrade governance practices through the adoption of revisions to by-laws and other structural mechanisms. These governance best practices relate to board composition (including athlete representation), independence of directors, proper orientation for board members, committees, risk management, and transparency": Canadian Olympic Committee, "Canadian Sport Governance Code" (last accessed 29 December 2023), online: <https://nso.olympic.ca/wp-content/uploads/2021/10/Canadian_Sports_Governance_Code.pdf> [https://perma.cc/X25L-B8QE] [Governance Code].

necessary to assess a lower-level organization's compliance with certain rules or standards. These necessary resources include human resources (e.g., auditors or compliance officers), financial resources (e.g., money to hire auditors or compliance officers, and to fund educational initiatives for lower-level organizations), and information gathering resources (e.g., mandatory reporting tools). Investments in such resources are critical as lower-level organizations are unlikely to proactively report to higher-level organizations on their non-compliance with standards of conduct or their own organizational dysfunction.[45]

A third factor is that a board of directors responsible for governing a higher-level organization may lack the expertise and experience needed to enable the organization to carry out a supervisory role over lower-level organizations. For example, a recent review examining the NSO for hockey (Hockey Canada) found that its board of directors lacked the range, depth and diversity of experience needed to properly govern and lead significant cultural change in the sport.[46] In the context of maltreatment, this limitation may be prevalent amongst the boards of directors of NSOs and PTSOs as maltreatment is a subject-matter that directors may be less familiar with, unlike other regulated aspects of sport, such as the rules of the game or rules against doping.

As a final factor, a higher-level organization's board of directors may have a non-interventionist approach regarding its direct and indirect jurisdictional authority over lower-level organizations. This non-interventionist approach may arise from a trepidation about sanctioning the very lower-level organizational members that elect the board of directors of the higher-level organization or the impact of a sanction against a lower-level organization (e.g., suspension, expulsion) on athletes participating at that

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45 This lack of voluntary reporting by lower-level organizations was reflected in a survey of sport organizations conducted as part of a review of independent approaches to prevent and address maltreatment in Canadian sport. In response to the survey, one national sport organization observed that "[o]ur [provincial/territorial sport organizations (PTSOs)] do not want to report to us. Clubs are independent organizations and are members of the PTSOs and not the national body. We are being told we have accountability but as an NSO have zero authority to implement beyond our own organization": McLaren, Copeland & Tesic, *supra* note 35 at 36.

46 Cromwell, *supra* note 25 at 77.

level of the sport.[47] A non-interventionist approach may also be due to the higher-level organization's preoccupation with preventing and addressing maltreatment within its *own* organization, while at the same time experiencing resistance from lower-level organizations in being regulated by the higher-level organization. As noted by McLaren:

> The different levels [of Canada's sport hierarchy] don't particularly get along with each other [...] The provincial levels challenge the national organization frequently, and there's not a good rapport there. And the provincial levels also have difficulties with the grassroots clubs [...] And that problem is common across most sports in Canada.[48]

In summary, a non-interventionist approach and the lack of clear rules, resources, and qualified and diverse directors, have prevented higher-level organizations, such as NSOs and PTSOs, from exercising jurisdictional authority over lower-level organizations to effectively address maltreatment at all levels of sport, including the organizational factors associated with maltreatment. As a result, the sport system has been unable to self-correct the problem of maltreatment without the intervention of external sources – namely, the government. However, as discussed in the following subsection, even with government intervention, jurisdictional impediments to addressing maltreatment remain.

3.2. Funding Role of Governments

Up until recently, federal, provincial, and territorial governments have not used their funding authority to prioritize safe sport initiatives. Government funding initiatives have focused on high-performance sport

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47 For example, as noted in *ibid* at 24; "while Hockey Canada's By-laws clearly lay out its powers to regulate and enforce principles, standards and rules [...] enforcement often does not occur and [...] this is due, in part, to the practical difficulties associated with enforcement [...] Directors do not want to exert undue control [over provincial/territorial organization] in part because it is [these] members who elect them and also because the sanctions for non-compliance are limited and severe (e.g., suspension and expulsion)."

48 Richard McLaren, "Standing Committee on the Status of Women, Evidence, 44th Parliament, 1st Session, January 30, 2023" (last accessed 29 December 2023) at 15, online: Government of Canada <https://www.ourcommons.ca/Content/Committee/441/FEWO/Evidence/EV12186981/FEWOEV47-E.PDF> [https://perma.cc/86LW-LFZU].

and Canada's performance at international sport events.[49] As Kidd, Kerr and Donnelly note, this approach to funding has "created cultural enablers for maltreatment."[50] Publicly funded NSOs and PTSOs have been incentivized to implement an ideology of winning-at-all-costs in their governance and operations. However, in response to high-profile incidents of maltreatment – as well as advocacy from athletes, athlete associations, and scholars – governments have turned their attention to using their funding powers to require sport organizations to adopt safe sport measures.

At the federal level, Sport Canada requires every federally-funded NSO to (i) incorporate the UCCMS into its policies and procedures, (ii) become a signatory of the "Abuse-Free Sport" program (whereunder individuals affiliated with the NSO have access to a national independent body known as the Office of the Sport Integrity Commissioner that can investigate and adjudicate allegations of maltreatment), and (iii) ensure that individuals affiliated with the NSO complete appropriate mandatory training on preventing and addressing maltreatment.[51] Importantly, these funding conditions do not require an NSO to impose the same conditions on lower-level sport organizations over which the NSO exercises jurisdictional authority.[52]

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49 For example, aside from Sport Canada's reference-level funding to support an NSO's delivery of core options, the majority of eligible projects funded by Sport Canada relate to high-performance sport: see Government of Canada, "Application Guidelines – National Sport Organization" (last accessed 30 December 2023), online: <https://www.canada.ca/en/canadian-heritage/services/funding/sport-support/national-organization/application-guidelines.html> [Canada, "Guidelines for NSOs"].

50 Bruce Kidd, Gretchen Kerr & Peter Donnelly, "Ensuring Full and Safe Participation by Canadian Girls and Women, Fair Athlete Representation, and Good Governance in Canadian Sport - A brief to The Standing Committee on the Status of Women and The Standing Committee on Canadian Heritage, House of Commons" (last accessed 29 December 2023) at 4, online: Government of Canada <https://www.ourcommons.ca/Content/Committee/441/FEWO/Brief/BR12169828/br-external/Jointly01-e.pdf> [https://perma.cc/R9XZ-YZBE] [Kidd, Kerr & Donnelly, "Brief"].

51 Canada, "Guidelines for NSOs", *supra* note 49. NSOs can also receive additional safe sport project-specific funding to assist with the costs associated with implementing these conditions, as part of the Government's 2019 Budget commitment to investing in safe sport.

52 This is because Sport Canada's conditions only extend to "individuals affiliated with

With respect to the organizational factors that contribute to maltreatment, Sport Canada requires NSOs to comply with basic standards on governance and, as a short-term pilot, implemented a "report card" tool that required NSOs to provide evidence of their performance on governance-related elements, including board structure, board role and responsibility, board composition, board development, conflicts of interest, dispute resolution, financial strategy and control, strategic planning, and risk management.[53] The report card results did not directly affect the amount of funding that an NSO received for its core operations and business.[54] Instead, the report card tool was intended to assist an NSO in identifying gaps or weaknesses in its governance so that its requests for funding to the federal government could focus on those areas for improvement.[55] However, following widespread criticism of the accuracy and effectiveness of the report card tool, the federal government decided to end the pilot in December 2023.[56] Additionally, the federal government has indicated that, by April 2025, federally-funded NSOs will be required to adopt the principles in the Canadian Sport Governance Code (referred to earlier).[57] These principles relate to athlete representation and diversity on

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the national sport organization." The term "individuals affiliated with the national sport organization" includes an athlete, a coach, an official, an athlete support personnel, an employee, a contractual worker, an administrator, or a volunteer acting on behalf of, or representing the NSO in any capacity: Canada, "Guidelines for NSOs", *supra* note 49. However, this term would not include PTSOs, local clubs, or participants affiliated with those sub-national organizations.

53 Cromwell, *supra* note 25 at 39.

54 Government of Canada, "Transition material 2021 — Minister of Sport" (last accessed 30 December 2023), online: Government of Canada <https://www.canada.ca/en/canadian-heritage/corporate/transparency/open-government/transition-2021-sport.html> [https://perma.cc/CS2D-GDRW].

55 Cromwell, *supra* note 25 at 39.

56 Grant Robertson, "Sport Canada shelves report-card system that gave high marks to troubled organizations" (last accessed 30 December 2023), online: The Globe and Mail <https://www.theglobeandmail.com/canada/article-sport-canada-report-cards-shelved/> [https://perma.cc/NF7B-CBHX].

57 Government of Canada, "Minister St-Onge announces new measures to improve accountability and foster a safe and sustainable culture change in sport" (last accessed 30 December 2023), online: <https://www.canada.ca/en/canadian-heritage/news/2023/05/minister-st-onge-announces-new-measures-to-improve-accountability-and-foster-a-safe-and-sustainable-culture-change-in-sport.html> [https://perma.cc/K2A3-QUZ5].

boards of directors, board independence and term limits, proper training for board members, and transparency in governance. Similar to the funding conditions relating to addressing maltreatment, this funding condition relating to governance standards does not require NSOs to ensure that the same standards are followed by lower-level organizations.

At the provincial and territorial government level, the funding of PTSOs is generally subject to conditions relating to preventing and addressing maltreatment or ensuring good governance. However, the prescriptive nature of these conditions and their alignment with federal initiatives, such as the UCCMS, the Abuse-Free Sport program, and the Canadian Sport Governance Code, varies considerably. British Columbia, for example, has created its own version of the UCCMS and requires publicly funded sport organizations to adopt their own safe sport policies that align with it.[58] British Columbia has also committed to provide an independent mechanism to manage maltreatment complaints.[59] Nova Scotia's sport funding agency (Nova Scotia Sport) requires sport organizations to adopt the UCCMS and have maltreatment complaints investigated and adjudicated through the national Abuse-Free Sport program.[60] The Quebec government requires publicly funded sport organizations to have an integrity protection policy respecting abuse, harassment, negligence and violence, and to utilize a provincially-established independent complaint management mechanism.[61] In contrast, in other provinces and territories, such as Ontario and Alberta, there are only

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58 viaSport British Columbia, "BC Universal Code of Conduct" (last accessed 30 December 2023), online: <https://viasport.ca/resources/bc-universal-code-of-conduct/> [https://perma.cc/LK9Z-RRSB].

59 viaSport British Columbia, "Safety in Sport Project Updates" (last accessed 30 December 2023), online: <https://viasport.ca/safety-in-sport-project-updates/> [https://perma.cc/KEN5-9M3T].

60 Donna Spencer, "National sport organizations face safe-sport deadline, risk losing funding" (last accessed 30 December 2023), online: CBC <https://www.cbc.ca/sports/national-sport-organizations-safe-sport-deadline-risk-losing-funding-1.6796933> [https://perma.cc/7KEZ-7PM2].

61 Sports Quebec, "Ministerial Statement on the Protection of Integrity in the Context of Sport and Leisure" (last accessed 30 December 2023), online: <https://www.sportsquebec.com/sport-securitaire/integrite-sport/> [https://perma.cc/4ALM-66MP]. See also Bill 45, *An Act to amend the Act respecting safety in sports mainly to better protect the integrity of persons in recreation and sports*, 1st Sess, 43rd Legislature, National Assembly of Québec.

general requirements for publicly funded PTSOs to have vaguely-described 'effective governance structures' and 'codes of conduct that address abuse and harassment', without an independent mechanism to investigate and adjudicate complaints about maltreatment.[62]

While the efforts of the federal government and some provincial or territorial governments are laudable, there are several limitations with relying on a funding power to address systemic maltreatment in sport. First, it is only a funding power, not a licensing or recognition power – meaning that the only sanctions for non-compliance that can be levied by governments against NSOs or PTSOs are the suspension and removal of public funding. Despite their own claims to the contrary,[63] Canadian governments have no authority to "recognize" a sport organization as the governing body for its sport at a particular regional level. This authority could only exist if granted to the government by statute and, even then, it would be of limited value. As noted above, the sport system consists of a hierarchy of private organizations from the international level to the local level. It is an international sport federation that decides which NSO can be a member of the international federation and the governing body for the sport at the national level. International federations do not defer to or rely upon national governments to decide which organization should be a NSO and member of the international federation.[64] In fact, some international federations require their NSO members to maintain independence from their respective national governments.[65] The same analysis applies to PTSOs

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62 Government of Alberta, "Provincial Sport Organization Association Development Program Eligibility (last accessed 30 December 2023), online: <https://www.alberta.ca/system/files/custom_downloaded_images/cms-provincial-sport-oganization-association-development-program-eligibilty.pdf> [https://perma.cc/6YFQ-H94K]; Government of Ontario, "Sport recognition policy for provincial and multi-sport organizations" (last accessed 30 September 2023), online: <https://www.ontario.ca/page/sport-recognition-policy-provincial-and-multi-sport-organizations> [https://perma.cc/2UZS-M6YF] [Ontario "Recognition Policy"].

63 See Ontario "Recognition Policy", *ibid.*

64 In the case of Olympic sports, the COC also plays a role in deciding which NSOs should be recognized for the purpose of belonging to the Olympic Movement and being part of the process for selecting national athletes to compete at the Olympic Games. While the COC may require NSOs to be in good standing with Sport Canada, the power to impose this requirement emanates from the COC, and not the government.

65 See Fédération Internationale de Football Association, "FIFA Statutes May 2022

– it is the NSO that decides which provincial or territorial organization can be a member of the NSO and govern the sport at the provincial and territorial level. The recognition of a PTSO by its respective provincial or territorial government would only be relevant if such recognition was a condition of membership imposed by the NSO in its constitution or bylaws.[66]

A second limitation of a government's funding authority is that the government does not utilize an independent process to verify whether an NSO or PTSO has complied with its funding obligations. The government has the ability to assess the NSO's or PTSO's compliance with funding conditions, pursuant to contractual audit powers or the statutory powers of the government's auditor general.[67] However, the government may not exercise those audit powers due to a lack of dedicated resources or competing priorities and demands. Instead of having an independent and objective process to verify compliance, a government may rely upon the NSO or the PTSO to self-report on its compliance with funding conditions. For example, Sport Canada has relied on NSOs' self-reports of compliance with funding obligations and does not yet have a process to verify or assess the accuracy of such self-reports.[68] The risk with relying on self-reporting to

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edition" (last accessed 30 December 2023) at 19, online: <https://digitalhub.fifa.com/m/505d504a8580ec63/original/FIFA-Legal-Handbook-2023-EN.pdf> [https://perma.cc/R7MF-XJJV].

66 See Swimming Natation Canada, "General By-Law No. 1" (last accessed 30 December 2023), online: <https://www.swimming.ca/content/uploads/2020/09/5.1-GENERAL-BYLAWS-SNC.pdf> [https://perma.cc/75Z8-P3P5].

67 See *Auditor General Act*, RSO 1990, c A.35.

68 See Michel Ruest, "Standing Committee on Canadian Heritage, Evidence, 44th Parliament, 1st Session, July 26, 2022" (last accessed 30 December 2023) at 17, online: Government of Canada <https://www.ourcommons.ca/Content/Committee/441/CHPC/Evidence/EV11912483/CHPCEV40-E.PD> [https://perma.cc/7JE5-HDM8]. Sport Canada has since created a new compliance and accountability unit to monitor more closely organizational behaviour and hold organizations to greater account: Grant Robertson & Rachel Brady, "Ottawa creates safe sport compliance office to monitor national organizations" (last accessed 30 December 2023), online: The Globe and Mail <https://www.theglobeandmail.com/canada/article-sport-canada-compliance-office/> [https://perma.cc/KKV6-LQNX]. However, it is not yet clear whether

assess an NSO's or PTSO's compliance with funding obligations is self-evident – the sport organization is incentivized to under-report non-compliance in order to avoid any suspension or removal of public funding that may impact its operations.

A related third limitation with the funding authority exercised by governments is their will to enforce it, even where they have evidence of an NSO's or PTSO's non-compliance. As noted by Thibault and Harvey[69] and Kerr and Donnelly[70] in relation to Sport Canada, up until recently[71] there were generally no consequences for NSOs that did not comply with funding conditions, including those related to safe sport.[72] As a result, even where Sport Canada had evidence of an NSO's non-compliance with funding obligations, it did not typically exercise its authority to suspend or remove the NSO's funding.[73]

To conclude, the lack of jurisdictional authority exercised by NSOs and PTSOs over lower-level organizations and the limitations of governments' funding authority over NSOs and PTSOs have been barriers to effectively addressing maltreatment at all levels of the Canadian sport system. These barriers do not operate separately; rather, they intersect and have a resultant compounding effect. The most significant efforts to address the organizational factors contributing to maltreatment in sport (specifically, formal standards of acceptable conduct in the form of the UCCMS, the

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this new compliance and accountability unit will independently audit a federally funded sport organization's compliance with funding conditions.

69 Lucie Thibault & Jean Harvey, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013) [Thibault & Harvey].

70 Donnelly & Kerr, *supra* note 41.

71 In 2022-2023, Sport Canada suspended the funding of several NSOs, including Hockey Canada, Gymnastics Canada and Bobsleigh Canada, to enforce their compliance with funding conditions: Grant Robertson, "Failing grades - How lax oversight at Sport Canada, including a poorly designed report card system, missed key signs of trouble inside Canadian sports" (last accessed 30 December 2023), online: The Globe and Mail <https://www.theglobeandmail.com/canada/article-sport-canada-nso-report-card/> [https://perma.cc/DV7P-FUYX].

72 Donnelly & Kerr, *supra* note 41; Thibault & Harvey, *supra* note 69.

73 No similar research exists at the provincial/territorial level, but it is possible that the same limitation exists.

implementation of an independent mechanism to investigate and adjudicate violations of those standards in the form of the national Abuse-Free Sport program, and good governance standards for sport organizations) have only been imposed at the federal level on NSOs through conditions attached to public funding. As discussed in this section, there are inherent limitations with this funding authority, some of which can and are being addressed by the federal government (e.g., government-led audits of compliance[74]). However, these federal efforts will be limited to the national level due to the lack of jurisdictional authority exercised by NSOs in the sport hierarchy over lower-level sport organizations. The same will be true for future initiatives recently proposed by the federal government, including a "sport integrity framework" and a policy to safeguard children in sport.[75] If existing and future federal initiatives cannot permeate down to the provincial, territorial, and local levels of sport, then there is a dilution of the impact of the federal government's funding authority, and a gap in addressing systemic issues at sub-national levels of sport. While this gap can be remedied, in part, by the coordinated actions of provincial and territorial governments to impose the same funding conditions on PTSOs, the lack of jurisdictional authority exercised by PTSOs will prevent the funding conditions from being imposed on local clubs. This flaw in the sport system was observed by Canada's former Minister of Sport (Pascale St-Onge): "the reality is that the sport system touches multiple jurisdictions [federal, provincial, territorial, local] and I [as the Minister of Sport, on behalf of the federal government] can't fix it [the sport system] alone. There needs to be coherence in this system, and what we are seeing is that there is no coherence right now."[76]

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74 See *supra* note 68.

75 Ashley Burke, "Federal government launching commission to probe systemic abuse in sports" (last accessed 31 December 2023), online: CBC <https://www.cbc.ca/news/politics/ottawa-independent-mechanism-review-abuse-canadian-sport-1.7054257> [https://perma.cc/C8ED-W8PW] [Burke].

76 Patrick Burke, "Canadian Sports Minister admits greater safeguarding 'coherence' needed after abuse scandals" (last accessed 30 December 2023), online: insidethegames.biz <https://www.insidethegames.biz/articles/1133709> [https://perma.cc/39T5-VKMC].

4. INITIATIVES TO ADDRESS MALTREATMENT IN CANADIAN SPORT

Due to limitations of Canada's self-regulatory sport system and a lack of response by sport organizations, athletes have had to rely on two legal tools to address the systemic organizational factors that contribute to maltreatment in sport. The first is the recent introduction of an independent mechanism to investigate and adjudicate alleged violations of the UCCMS. The second is the use of civil litigation. In response to widespread incidents of maltreatment involving a number of Canadian sport organizations, a series of class action lawsuits have been filed by athletes based on the tort of systemic negligence that positions the sport organization as the direct source of the harm. These lawsuits assert that sport organizations have a duty to athletes participating in their programs, activities, and events to ensure an environment that is free from physical, psychological, and sexual maltreatment. These lawsuits can be distinguished from a long line of case law that focuses on the direct wrongdoing of the individual perpetrator and the indirect or vicarious liability of the organization.

The following subsections discuss each of these tools – an independent mechanism to manage complaints of maltreatment, and class action lawsuits based on the tort of systemic negligence – with an emphasis on their effectiveness in holding sport organizations directly accountable for organizational flaws contributing to maltreatment, and their ability to create systemic change in the sport system.

4.1. Independent Mechanism

There has been a growing recognition of the need for greater accountability, transparency and fairness in the way sport organizations manage complaints about maltreatment. Studies that survey the perspectives of athletes about maltreatment within their sport organizations find that organizations do not have adequate complaint management systems due to ambiguous or poorly drafted policies, a lack of capacity and resources to receive and investigate complaints, investigators who lack the objectivity and impartiality needed to identify maltreatment, and the risk of intimidation or retaliation towards those making complaints.[77]

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[77] See Willson et al, *supra* note 26.

In response to these concerns, several jurisdictions have established independent third-party mechanisms to manage complaints about maltreatment.[78] In general, a mechanism is considered independent because it manages the maltreatment complaint outside of the sport organization.[79] However, actual independence is much more nuanced depending on how the mechanism is funded and how it is governed and operated in relation to the sport organization. There can also be variability in the role of an independent mechanism in the management of a complaint. Some independent mechanisms remove from the purview of the sport organization, the entire process from complaint intake to adjudication and all processes in between (e.g., the American independent third-party mechanism known as the U.S. Center for Safe Sport).[80] Other mechanisms make various independent services available but leave the use of such processes up to the discretion of the sport organization. In the United Kingdom, for example, Sport Integrity is a program that offers confidential complaint intake and investigation services.[81] The Sport Integrity program is operated by two organisations that are external to and independent of NSOs in the United Kingdom: Crimestoppers, an independent charity, operates the complaint intake service, and Sport Resolutions, an independent sport-specific dispute resolution service, conducts the investigations.[82] In Australia, NSOs have sole jurisdiction to resolve maltreatment disputes; however, Sport Integrity Australia, an agency created

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78 For example, the United States, the United Kingdom, and Australia.

79 Kerr, Kidd, Donnelly, "Advancing Safe Sport in Canada: A Statement on Independence'. CSPS Position Paper, January 2020" (last accessed 29 December 2023), online: University of Toronto <https://kpe.utoronto.ca/sites/default/files/advancingsafesportincanada.pdf> [https://perma.cc/922A-KLVR].

80 US Centre for Safe Sport (last accessed 29 December 2023), online: <https://uscenterforsafesport.org/> [https://perma.cc/L8QG-GDZN]. This is a mandatory program for those sport organizations receiving federal funding in the United States.

81 Sport Integrity also offers educational and training programs to assist sport organizations. Sport Integrity is currently a pilot project operating free of charge at the high performance Olympic and Paralympic sport level.

82 Geof Berkeley, "UK Sport establishes independent integrity service to handle complaints" (last accessed 29 December 2023), online: insidethegames.biz <https://www.insidethegames.biz/articles/1121576/uk-sport-launches-integrity-service> [https://perma.cc/9PC3-88GJ].

by legislation,[83] offers sports an independent complaint management process on a discretionary basis, including reporting, investigative and adjudicative services.[84] New Zealand similarly offers a voluntary independent complaint management service. As with the model in the United Kingdom, both the Australian and New Zealand models operate at the national, high-performance sport level.

Canada has introduced a system – primarily at the national level of sport – wherein the entire complaint management process is removed from the sport organization and is handled by the independent Office of the Sport Integrity Commissioner (OSIC). When first introduced in 2022, OSIC was housed within the Sport Dispute Resolution Centre of Canada (SDRCC); however, the federal government has announced plans to move OSIC out of SDRCC and into the Canadian Centre for Ethics in Sport (CCES).[85] Through its Abuse-Free Sport program, OSIC receives complaints concerning violations of the UCCMS, conducts investigations,[86] and issues binding decisions about any such violations of the UCCMS (including imposed sanctions). OSIC's decisions about violations and sanctions under the UCCMS can be appealed by arbitration hearing at SDRCC's Safeguarding Tribunal. OISC also conducts audits assessing the policies and environment of sport organizations (known as "sport environment assessments"). The creation of OSIC is a positive and comprehensive development for Canadian sport and one supported by the

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83 Australian Government, "Sport Integrity Australia Act 2020", (last accessed 29 December 2023), online: <https://www.legislation.gov.au/Details/C2021C00549> [https://perma.cc/88E3-386H]

84 Sport Integrity Australia, "National Integrity Framework: complaints, disputes and discipline policy" (last accessed 29 December 2023), online: <https://www.sportintegrity.gov.au/sites/default/files/SIA_NIF_COMPLAINTS%2C%20DISPUTES%20DISCIPLINE_WEB.pdf> [https://perma.cc/6RK6-BH97].

85 The move was motivated by a desire to maintain the independence of OSIC: Ashley Burke, "Federal government launching commission to probe systemic abuse in sports" (last accessed 12 December 2023), online: CBC <https://www.cbc.ca/news/politics/ottawa-independent-mechanism-review-abuse-canadian-sport-1.7054257> [https://perma.cc/RER7-8RHB]. See also Canadian Centre for Ethics in Sport, "An Update on the Transition of the Office of the Sport Integrity Commissioner and the Abuse-Free Sport Program" (last accessed 14 May 2024), online: <https://cces.ca/ministerstatement> [https://perma.cc/2J7W-YCE7].

86 OSIC also provides mediation services to address complaints where there has not been a formal investigation.

sport system as a whole; however, a number of problems exist that make resolving the systemic organizational issues contributing to maltreatment in sport difficult.[87]

4.1.1. OSIC's Focus on Individual Misconduct

A significant issue affecting OSIC (and independent mechanisms in other jurisdictions) is that its primary focus is on individual complainants and individual incidents of maltreatment. The focus is not on the systemic organizational issues contributing to maltreatment across sport. This narrow focus is unfortunate as the complaint intake process is centralized through OSIC and can theoretically provide a mechanism to track trends and common issues across and within organizations that may be contributing to incidents of maltreatment.

OSIC has also developed a sport environment assessment process wherein, by way of its own initiation or through an incoming complaint, OSIC may elect to audit the operational management of a particular sport organization, including its policies.[88] This sport environment assessment process is in its infancy and its impact on the operations of sport organizations is not yet known. However, the assessment function lacks coercive powers to compel the production of documents by organizations or individuals, and to ensure that any findings or recommendations arising from the assessment are implemented. While such coercive powers exist by way of contract when OSIC is investigating and adjudicating violations of

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87 A number of other concerns have been raised with various such independent mechanisms, many of which relate to capacity issues and the newness of such bodies, including backlogs of complaints, lapses of time between the acceptance and resolution of complaints, dealing with historical complaints, and the skill and knowledge of personnel: see, for example, Dan Murphy & Pete Madden, "US Centre for SafeSport, Olympic Movement's misconduct watchdog, struggles to shed 'paper tiger' reputation" (last accessed 29 December 2023), online: ESPN <https://www.espn.com/olympics/story/_/id/33348656/us-center-safesport-olympic-movement-misconduct-watchdog-struggles-shed-paper-tiger-reputation> [https://perma.cc/Z8VT-DXEY]; Donna Spencer & Lori Ewing, "Canada's sport integrity commissioner under microscope for low complaint intake" (last accessed 29 December 2023), online: The Globe and Mail <https://www.theglobeandmail.com/canada/article-sport-canada-compliance-office/> [https://perma.cc/YYW3-X5N8].

88 See Office of the Sport Integrity Commissioner, "Sport Environment Assessment" (last accessed 29 December 2023), online: <https://sportintegritycommissioner.ca/sport-environment-assessment> [https://perma.cc/SG6J-LTVQ].

the UCCMS (see discussion below), they do not apply to the sport environment assessment process as it is independent of the UCCMS complaint process and operates by way of a separate contract.

4.1.2. OSIC's Jurisdictional Scope

OSIC's jurisdiction to investigate and adjudicate complaints of maltreatment arises from contract. However, this contractual authority applies to sport organizations in a different way than to individuals affiliated with sport organizations. In the case of a sport organization, OSIC has direct jurisdictional authority if the organization has become a signatory of OSIC's Abuse-Free Sport program. The act of becoming a signatory of the program creates a direct contract between OSIC and the sport organization. In contrast, in the case of an individual affiliated with a sport organization, OSIC does not have direct jurisdictional authority over the individual. Instead, OSIC's authority is indirect and arises from the contract between the sport organization and the individual, through which the individual consents to comply with the UCCMS and to its administration and enforcement by OSIC.[89] As explained below, this dual contractual model (i.e., a contract between the sport organization and OSIC, and a contract between the sport organization and an individual affiliated with the sport organization) limits OSIC's authority to investigate complaints of maltreatment – specifically, its ability to accept jurisdiction over a complaint, and its ability to gather information during an investigation.

With respect to OSIC's jurisdiction to accept a complaint, while all NSOs and multi-sport organizations[90] receiving federal funding are required to become signatories of OSIC's Abuse-Free Sport program, PTSOs, universities, colleges, provincial and regional athletic associations for high schools, and local teams and clubs are under no obligation to become signatories. Indeed, OSIC has no jurisdiction beyond the national level unless a PTSO or other sport organization becomes a signatory of the

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89 See Office of the Sport Integrity Commissioner, "Executive Summary of the Signatory Agreement" (last accessed 29 December 2023), online: <https://sportintegritycommissioner.ca/files/Summary_of_Program_Sig_Agreement_-_Final_-_EN.pdf.> [https://perma.cc/Y3V4-BWDG] [OSIC, "Executive Summary of the Signatory Agreement"].

90 For example, U Sports, the COC, the Canadian Paralympic Committee, and Commonwealth Sport Canada.

program and voluntarily brings itself under OSIC's jurisdiction.[91] This is concerning. Of the 193 complaints received by OSIC in the first year of operation, 127, or two thirds, were not within its jurisdiction. According to OSIC, most of the complaints did not relate to complaints at the national level but rather at the provincial, territorial and grassroots levels of sport over which OSIC does not have jurisdiction due to the absence of a contract between OSIC and the organizations that govern sports at those levels.[92]

With respect to OSIC's jurisdiction during investigations of accepted complaints, its powers to gather information from individuals (e.g., a complainant or an alleged perpetrator) are indirect and dependent on the existence of a contract between the sport organization and individual, whereby the contract requires the individual to respect OSIC's jurisdiction. As a result, if an individual refuses to provide information to OSIC during an investigation, then OSIC has no contractual rights to compel the production of information by the individual as OSIC is not a party to the contract between the individual and sport organization. Only the sport organization has contractual rights to compel the individual to provide the requested information.[93] The needed cooperation of the sport organization in the investigative process weakens the independence of OSIC's authority. OSIC's only recourse in this scenario of non-compliance is to make a finding that the individual is obstructing an investigation (which is a violation of the UCCMS) and to issue a sanction for the violation against the individual. However, as discussed in the following subsection, OSIC's authority to enforce such a sanction is limited.

4.1.3. OSIC's Power to Issue and Enforce Sanctions

OSIC's authority to issue and enforce sanctions relating to the UCCMS is limited in two respects. First, OSIC's authority to issue sanctions under

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91 One province (Nova Scotia) has agreed to make its PTSOs participate in OSIC's Abuse-Free Sport program, as have PTSOs under Volleyball Canada: Office of the Sport Integrity Commissioner, "OSIC Annual Report - Year One June 2022 - June 2023" (last accessed 29 December 2023), online: <https://sportintegritycommissioner.ca/files/2023-08-02_Abuse-Free_Sport_Year_One_Report.pdf?_t=1691017763> [https://perma.cc/ASB9-NJNS].

92 *Ibid.*

93 For example, the organization could use its contractual rights to threaten to suspend the individual's employment or participation opportunities if they did not comply with the OSIC investigation process.

the UCCMS is specific to individual violators of the UCCMS.[94] The UCCMS addresses individual conduct issues; it does not deal with organizational issues. In other words, an organization is never held responsible for the actions of its members, staff or participants who engage in maltreatment or some other type of prohibited misconduct (e.g., failing to report maltreatment or interfering with an investigation into maltreatment). Indeed, under the UCCMS, OSIC has no sanctioning powers in relation to an organization, even where an organization's own officers and directors engage in misconduct while governing or operating the organization (e.g., discouraging the reporting of complaints, not respecting sanctions issued against individuals affiliated with the organization, such as a coach). As a result, the UCCMS provides no consequences for an organization that fails to address institutional factors contributing to maltreatment.

Second, OSIC has limited authority to sanction an organization that (when acting through its officers and directors) does not respect a sanction issued by OSIC against an individual affiliated with the organization (e.g., coach, administrator). OSIC's authority is limited to the Signatory Agreement (contract) with the sport organization. Under the terms of this agreement, the organization agrees to, "[ensure] that any sanctions or measures which are imposed by the DSO [Director of Sanctions and Outcomes], Safeguarding Tribunal or the Appeal panel, are implemented, respected, and adhered to".[95] However, no enforcement mechanism is included in the agreement. In theory, OSIC could sue the sport organization for breach of contract and seek interim relief in the form of injunction to prevent the organization's non-compliant behaviour, but this is not a practical or efficient legal remedy. A more practical remedy would be to suspend the sport organization's receipt of public funding; however, OSIC has no authority to do this. Rather, OSIC would need to refer the matter to the relevant government funding authority (e.g., Sport Canada in the case of an NSO) and the government authority would decide whether the sport organization's funding should be suspended.

In summary, while there may be a punitive element to issuing sanctions against a sport organization for its institutional role in maltreatment or enforcing a sport organization's compliance with sanctions issued under the

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94 See section 7 of UCCMS, *supra* note 8.

95 OSIC, "Executive Summary of the Signatory Agreement", *supra* note 89.

UCCMS against individuals, the collective goal of such enforcement is to effect behavioural change within the organization and avoid enforcement gaps in the sport system. OSIC requires stronger enforcement powers to ensure that this goal of organizational accountability is met.

4.1.4. OSIC's Funding

A persistent criticism about the use of independent mechanisms that investigate and adjudicate allegations of maltreatment involving sport organizations is that these services are paid for, in part or wholly, by the sport organization itself, raising concerns of a conflict of interest and bias in the investigation and adjudication processes.[96] This has been the case with both private adjudicative businesses and legislated or government-sponsored programs.[97]

In the case of OSIC, the risk of conflict of interest or bias is mitigated somewhat by the federal government's funding contributions to OSIC. In 2022, the federal government committed to providing substantial funding for the implementation of OSIC.[98] Even so, the federal government requires

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96 Nicole Williams, "Can paid companies objectively investigate abuse in sport? These athletes say no" (last accessed 29 December 2023), online: CBC <https://www.cbc.ca/news/canada/ottawa/safe-sport-complaints-canada-athletes-companies-1.6788436> [https://perma.cc/MQZ7-WNHB].

97 The United States Olympic and Paralympic Committee (USOPC) is the largest source of funding for the U.S. Centre for SafeSport. A significant portion of this money comes from individual sports organizations and is partially based on the number of allegations reported. Thus, the more allegations of wrongdoing, the higher the fees. Similarly, the fewer allegations reported by the sport organization, the lower the fees. Other independent mechanisms are substantially funded through government sources, including in the U.K. and Australia. That said, such programs are still perennially challenged to find additional sources of funding to cover escalating costs: see McLaren, Copeland & Tesic, *supra* note 35 at 173, 180, 193, 199.

98 Government of Canada, "2022 Budget: A Plan to Grow Our Economy and Make Life More Affordable" (last accessed 29 December 2023), online: <https://www.budget.canada.ca/2022/home-accueil-en.html> [https://perma.cc/9UWB-ZFNG]. As noted in the 2022 Budget, a portion of $16M was earmarked for the implementation of OSIC. Another portion of the $16M was intended to ensure that national sport policies and practices reduce the risk of harassment, abuse, and discrimination and create a safer and more inclusive sport system. At the time of the release of the 2022 Budget, OSIC was part of SDRCC; as a result, the federal government provided this funding to SDRCC. The 2022/2023 Annual Report of SDRCC notes that a portion of SDRCC's allocation of the $16M

OSIC to operate on a cost-sharing model, necessitating some contribution from sport organizations based on their use of OSIC's services (i.e., the number of allegations filed with OSIC).[99]

Aside from the risk of conflict of interest or bias, another problem with this cost-sharing model used to fund OSIC is that it could have a chilling effect on how complaints are filed with OSIC. The greater number of complaints accepted and investigated by OSIC that relate to a particular sport organization, the greater the financial contribution of that organization the following year. This financial implication may result in sport organizations discouraging staff and athletes from reporting complaints to OSIC, even though such conduct is prohibited under the UCCMS. Accordingly, there is a growing sentiment among Canadian sport stakeholders that, in relation to OSIC, "true (as well as perceived) independence from sport organizations can only be achieved if the totality of the Abuse-Free Sport program is funded by government, and not in a cost-sharing model such as the current structure [...]."[100]

In conclusion, the introduction of OSIC as an independent complaint management system with investigative and adjudicative functions has the potential to bring greater accountability, transparency, and fairness to the operation of sport organizations. However, OSIC's services, while still in their infancy, lack the 'whole system' perspective necessary to truly address maltreatment across sport in a coordinated and effective way due to its

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was to be provided and spent as follows: $450,000 of the Abuse-Free Sport program funding to be utilized for program signatories funding for the initial entry fee of $5,000 for those that become program signatories during the period of April 1, 2022 and September 30, 2023; and $783,000 of the Abuse-Free Sport program funding to be utilized for future eligible expenses incurred during the period of April 1, 2023 and September 30, 2023. The future annual reports of SDRCC and CCES (once OSIC is housed within CCES) will provide greater detail about how the remainder of this allocation of the $16M will be spent for OSIC activities, as well as any additional funding earmarked for OSIC in the federal government's 2023 and 2024 Budgets.

99 Sport Dispute Resolution Centre of Canada, "Brief to the Standing Committee on the Status of Women pertaining to Women and Girls in Sport" (last accessed 29 December 2023), online: Government of Canada <https://www.ourcommons.ca/Content/Committee/441/FEWO/Brief/BR12176922/br-external/SportDisputeResolutionCentreOfCanada-Final-e.pdf> [https://perma.cc/BE98-NP7J].

100 *Ibid.*

primary focus on individual misconduct, its limited jurisdictional scope and sanctioning powers, and its current financing model.

4.2. Litigation based on Systemic Negligence

Recourse to courts can be an expensive, time-consuming, and emotionally trying experience. Nonetheless, athletes have sought such recourse where sport organizations have failed or refused to adequately respond to incidents of maltreatment.

Legal responsibility for maltreatment occurring within sport organizations has traditionally focused on the direct negligence (or other tortious conduct[101]) of the individual wrongdoer who inflicts the maltreatment and on the indirect, or vicarious liability of the organization for its failure to control or mitigate the risk of such harm happening to those it has a responsibility to keep safe.[102] From this perspective, the perpetrator is seen as a 'bad apple', somehow 'slipping through the cracks' of the organization and abusing the most vulnerable – most often the athlete. The organization is positioned as well-intentioned but targeted by the unscrupulous actor, although perhaps also seen as being careless or remiss itself for not recognizing and dealing with obvious indicators of abuse at the hands of the predator.[103] Hall refers to the organization in this legal conceptualization as the "honey pot" wherein a particular type of individual (e.g., bully, sexual abuser or predator) is drawn to the organization by certain of its inherent characteristics.[104] It is the bad actor who is the culprit and the target of punishment. [105] The organization may be found vicariously liable but, vicarious liability, as Hall notes, falls short of portraying the

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101 For example, the intentional torts of assault and battery.

102 Hall, *supra* note 3 at 162; Baillie, *supra* note 3; see also *Bazley v Curry* [1999] CanLII 692. Criminal laws also regulate the conduct of the perpetrator but do little to assist the victim or to address underlying issues of causation.

103 Hall, *ibid*.

104 Hall, *supra* note 4 at 6.

105 Accounts of institutional abuse suggest certain institutional characteristics are more likely to foster abusive behaviours than others. Three characteristics are repeatedly associated with a toxic culture of abuse: secrecy and isolation; the existence of a power or dependency relationship and, the existence of a dominant hierarchical structure increasingly centralizing power in an elite group: Hall, *supra* note 3 at 162; Cooper, *supra* note 17.

institution as a tortfeasor or wrongdoer.[106] The corrective action for the organization is to keep bad actors out in the future by introducing methods such as enhanced screening processes, better and more specific training of personnel and, in some instances, the introduction of greater professionalization among personnel.[107] However, it does not require the organization to reflect on, or acknowledge, its own culpability in instigating and perpetuating the abuse.

While plaintiffs may feel some relief in seeking retribution against an individual perpetrator, there are significant limitations to such litigation as an avenue to organizational change. A civil action against the perpetrator may not actually address the systemic organizational factors contributing to maltreatment in sport and the underlying concerns expressed by victims and survivors.[108] Indeed, an approach that focuses on individual incidents of abuse and individual perpetrators seriously underestimates the power of the organization in shaping the conduct of those in positions of authority and the power of those who engage in patterns of abuse. Hall proposes an alternate way of understanding abuse in institutional settings that focuses on the role of the institution in creating conditions that allow the abuse to occur and to persist in the first place.[109]

The "crucible" analysis of institutional abuse focuses on the internal dynamics of the organization as a significant causal source of abuse within the organization and provides the theoretical underpinnings for the tort of systemic negligence in a class action proceeding,[110] which specifically targets the direct responsibility of the organization as wrongdoer.[111] As described

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106 Hall, *supra* note 4 at 15.

107 Hall, *supra* note 3 at 162.

108 See, for example, athletes' perspectives: Nite & Nauright, *supra* note 15; Willson et al, *supra* note 26.

109 Hall, *supra* note 4. This does not preclude also holding the individual perpetrator culpable.

110 Direct liability can also be imposed on an organization in an individual action. However, the focus of this section is on the tort of systemic negligence in a class action proceeding, in light of the several class action lawsuits filed by Canadian athletes in several sports.

111 Hall, *supra* note 4 at 7; Margaret Isabel Hall & Aliya Chouinard, "Systemic Wrongdoing, Public Authority Liability, and the Explanatory Function of Tort Law: Two Case Studies" (2018) 84 S.C.L.R. (2d) 71 at 82 [Hall & Chouinard]. In

by Hall and Chouinard, "[o]nce a duty [of care] is established … systemic negligence describes a very different kind and quality of institutional conduct that includes institutional culture, explaining that culture, and the environment it creates, as a distinct source of harm."[112] Systemic negligence thus provides an alternate legal basis for recognizing the direct role of the organization in creating and promoting a culture in which abuse becomes part of the organizational ethos and is allowed to persist unabated, often as a normalized part of organizational operations. This organizational culture describes the commonly held values and norms, social practices, expectations, and assumptions that characterize and epitomize a particular institution, and defines what is encouraged, discouraged, accepted, or rejected within a group.[113] The culture of an organization can have a profound effect on the decision-making of members of the organization and their resultant actions.[114] As noted by Armacost:

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distinguishing systemic negligence from vicarious liability, an institution may be found responsible for the harm caused by the negligence of an individual perpetrator (i.e., vicarious liability); however, this is distinguishable from direct harm caused by a breach of the institution's duty of care by way of a system wide failure in the operation of the institution. "Systemic negligence" is alleged when the internal processes of an organization, not necessarily its servants, are at fault for failing to prevent harm: Baillie, *supra* note 3 at 50.

112 Hall & Chouinard, *ibid* at 82.

113 Boris Groysberg, Jeremiah Lee, Jesse Price & J. Yo-Jud Cheng, "What's Your Organization's Cultural Profile?" (last accessed 29 December 2023) online: Harvard Business Review <https://hbr.org/2018/01/the-leaders-guide-to-corporate-culture#> [https://perma.cc/4GJ3-CK84]. The authors identify four predominant and generally accepted attributes of organizational culture. First, culture is a group phenomenon made up of the shared behaviors, values, and assumptions of the organization and is typically experienced through the norms and expectations of the group, i.e., through its unwritten rules. Second, culture permeates all aspects of an organization and, as such, is "manifest in collective behaviors, physical environments, group rituals, visible symbols, stories, and legends [of the organization]" (at para. 10). Third, culture becomes a self-reinforcing social pattern and grows increasingly resistant to change and outside influences. People are drawn to organizations with characteristics similar to their own. Similarly, organizations are more likely to select individuals who seem to 'fit in'. Over time those who don't fit in tend to fall off leaving an increasingly homogeneous organization in thought, belief and deed. Fourth, culture "acts as a kind of silent language" (para. 12) that people instinctively recognize and to which they respond.

114 As the perceptions and actions of persons embedded in a particular institutional culture are affected, if not molded by that culture, the cultural norms and beliefs of the

> [I]ndividuals who are embedded in organizations do not make choices solely as individuals. To the extent that they accept the organizational or role-based frame, they will no longer be acting as isolated rational individuals; [they] are part of a team, agents of authority, absorbed in a larger cause. From the standpoint of the distinction between individual rationality and organizational rationality – [the organization's] goals and means dominate.[115]

Certainly, incidents of abuse are carried out through the acts of individuals, whether it be harassment, bullying, degradation, or persistent tolerance of maltreatment through wilful blindness. However, systemic negligence distinguishes organizational operations from the conduct of individual members of the organization in carrying out those operations. It positions these individuals not necessarily as individual rogues, or bad apples, who have infiltrated the system (although that might also be the case), but as a product of the system. The system is the so-called rogue. Systemic negligence is founded in the way that the institution is operated; that is, an institutional culture emerges in which aspects of its operation, exercised by those acting on behalf of the organization, deviate from accepted community standards on a system or organization-wide basis.[116] Acts or omissions of the organization are found to be negligent because they come as a result of a system that is inadequate and unable to protect people to whom it has a responsibility to keep safe.[117] For example, in one Canadian class action proceeding involving current and former students abused at a residential school, the court described an organization's systemic negligence as a "failure to have in place management and operations procedures that would reasonably have prevented the abuse."[118]

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organization act as the lens through which institutionally embedded participants interpret their roles and subsequently operate within the environment. Thus, where abuse occurs, it is necessary to take into consideration the backdrop of any systemic factors that combine to create a cultural breeding ground for such conduct and that ultimately belies a significant institutional failure.

115 Barbara E. Armacost "Organizational Culture and Police Misconduct" (2004) 72:3 George Washington Law Review, University of Virginia School of Law, Public Law Working Paper No. 03-6 at 509.

116 *Cavanaugh v. Grenville Christian College,* 2014 ONSC 290, 2021 ONCA 755 at para 368 [Cavanaugh].

117 *Ibid* at para 335; *Cloud v. Canada (Attorney General),* 2004 CanLII 45444 (ON CA) [Cloud] at paras 69, 80-83.

118 *Rumley v. British Columbia*, 2001 SCC 69 [Rumley] at para 30.

With respect to the evidence needed to prove the systemic negligence of an organization in a class action proceeding, Canadian courts have focused on objectively measurable evidence of the organizational norms, routines, methods, expectations, and enforcement of norms over time as a way of understanding whether the organization breached the applicable standard of care.[119] For example, courts looked to industry standards, mission statements, program content, policies and procedures, and disciplinary processes and sanctions, as a way of understanding allegations of systemic negligence.[120]

In response to widespread incidents of maltreatment involving a number of Canadian sport organizations, a series of class action lawsuits have been filed by athletes based on the systemic negligence of the sport organization itself as the source of the harm.[121] These cases argue that sport organizations have a duty to athletes participating in their programs, activities, and events to ensure an environment that is free from physical, psychological, and sexual maltreatment. The claimants argue that these organizations have the power, authority, and responsibility to fulfill that duty through the implementation and enforcement of appropriate standards and procedures. The failure to meet this duty forms the basis of their action based on a theory of systemic negligence.

The class action form of litigation is well-suited to a claim based on organizational, or institutional systemic negligence. Institutional systemic

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119 For example, see Cavanaugh, *supra* note 116 at para 335, Cloud, *supra* note 117 at para 80.

120 Cavanaugh, *ibid* at para 335.

121 *Carcillo v. Canadian Hockey League*, 2022 ONSC 1118 [Carcillo]; *Cline v. Gymnastics Canada*, Notice of Civil Claim, filed as S-223818 in the Supreme Court of British Columbia (11 May 2022) (On file with the authors) [Cline]; *Isaac v. Artistic Swimming*, Statement of Claim, filed as No.: 500-06-001134-218 in the Superior Court of Québec [Isaac]. The class action litigation format has also been utilized by athletes in other jurisdictions to address instances of organizational misconduct: see, for example, a class action lawsuit against the Australian Football league (Dan Oakes, "AFL concussion class action kicks off as league announces $25 million study of long-term health impacts" (last accessed 20 May 2024), online <https://www.abc.net.au/news/2023-03-14/afl-announces-funding-for-concussion-study/102091720> [https://perma.cc/GQW4-2E6X]), and a class action lawsuit against British Gymnastics (Jamie Gardner, "Legal claim from gymnasts alleging abuse may be resolved without going to court" (last accessed 20 May 2024), online: Independent <https://www.independent.co.uk/sport/british-gymnastics-ceo-british-uk-sport-b1868570.html> [https://perma.cc/QV2M-WBY6]).

negligence, by its very nature, affects a particular class of individuals across the institution – which, in the case of sport, is athletes. The class action is based on the common experience of a group of similarly situated persons, i.e., the class members[122] and, although there will be individual differences in the experiences of class members, the court will look for evidence confirming a pattern of conduct and a general consistency across class members' accounts about their experiences.[123] For example, in a case involving a religious boarding school, the court found that the alleged abuse was not a series of isolated one-off incidents but was "part of the school's culture since [the acts of abuse] were aligned with its philosophy and embedded in its operational policies to enforce its norms, rules and expectations." [124] The court concluded that students at the school were subjected to a systemic environment of physical and psychological abuse at the hands of staff.

In the case of the class action proceedings brought by Canadian athletes, the common experience is based on the alleged systemic negligence of the defendants' operation of their sport organizations and teams. For example, in *Carillo v. Canadian Hockey League (CHL)*, the defendants include the three major junior hockey leagues in Canada (operating under the umbrella organization CHL) and fifty-eight hockey teams that comprise the various leagues. The proposed class members (i.e., the players on the teams operated or overseen by the defendants), allege that the defendants acted in concert in perpetuating "a toxic system that condones violence, discriminatory, racist, sexualized, and homophobic conduct, including physical and sexual assault on the underage players they are obligated to protect."[125] In *Cline v. Gymnastics Canada et al.*, the defendants consist of the NSO for gymnastics (Gymnastics Canada) and six PTSOs that were "subject to and implemented the policies, standards and procedures [of the NSO] for the sport…"[126] The proposed class members (i.e., athletes participating

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122 A single person or a small group of individuals act as the 'representative party' for the class of plaintiffs. In the sport context, the representative plaintiff would be an athlete.

123 Cavanaugh, *supra* note 116 at para 308.

124 Cavanaugh, *ibid* at para 341.

125 *Carcillo v. Canadian Hockey League*, Statement of Claim, filed as No.: CV-20-00642705-00CP in the Ontario Superior Court, (3 May 2022) at para 4 (On file with authors) [Carcillo, "Statement of Claim"].

126 Cline, *supra* note 121 at paras 45, 48, 51, 54, 57, 60.

in the programs and events overseen or carried out by the defendants), allege that the defendants created a culture of abuse and failed to have in place appropriate reporting procedures, complaint management, and disciplinary measures to address issues of alleged abuse.[127] Finally, in *Isaac et al. v. Canada Artistic Swimming*, the proposed class members (i.e., past members of the senior and junior national teams of the NSO for artistic swimming) allege systemic negligence arising from the NSO's repeated failure to implement appropriate policies, violations of its policies, its reluctance and failure to investigate complaints properly and take appropriate action in response to complaints, and its overall failure to initiate and foster cultural and institutional change to its toxic training environment and programs.[128] At this point, none of the above-mentioned class action lawsuits have been certified to proceed to trial.

Class action lawsuits against sport organizations that seek to impose direct liability on one or more sport organizations based on an allegation of systemic negligence are not a panacea. Indeed, at the current time, none of the actions have been tried before a court. [129] They do, however, have the potential to address systemic issues underlying an abusive culture within sport. While each lawsuit focuses on the failings of organizations that govern a specific sport (as opposed to multiple sports), the outcome of the lawsuit can impact the entire sport system by changing organizational norms and practices. One of the main objectives of a class action is the deterrence of certain unacceptable or inappropriate behaviours,[130] especially where it is impractical to litigate individually, or where the impact of a single voice is minimal. A class action based on systemic negligence has the potential to deter institutional wrongdoing and shift the balance of power from the institution to the class of plaintiffs – in these cases, the athletes.

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127 Cline, *ibid.*

128 Isaac, *supra* note 121 at para 10.

129 The path of a class action lawsuit can be long and slow. The Canadian cases cited in this section have involved residential schools, where only one led to a trial decision that considered evidence of the organization's systemic negligence by breaching the applicable standard of care. The other cases cited were granted certification following and subsequently settled before a trial. With respect to the three lawsuits filed by Canadian athletes, all of them are awaiting certification following a motion hearing.

130 *Western Canadian Shopping Centres v. Dutton,* 2001 SCC 46 [CanLII]; *Hollick v. City of Toronto*, 2001 SCC 68 [CanLII]; *Rumley, supra* note 118.

5. PUBLIC INQUIRY

Current and former athletes,[131] safe sport advocacy organizations,[132] politicians,[133] scholars,[134] and two Parliamentary standing committees[135]

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131 See Ciara McCormack, "Standing Committee on the Status of Women, Evidence, 44th Parliament, 1st Session, December 1, 2022" (last accessed 31 December 2023) at 2, online: Government of Canada <https://www.ourcommons.ca/Content/Committee/441/FEWO/Evidence/EV12126594/FEWOEV43-E.PDF> [https://perma.cc/34DY-SHD4]; Myriam Da Silva Rondeau, "Standing Committee on the Status of Women, Evidence, 44th Parliament, 1st Session, December 1, 2022" (last accessed 31 December 2023) at 2, online: Government of Canada <https://www.ourcommons.ca/Content/Committee/441/FEWO/Evidence/EV12126594/FEWOEV43-E.PDF> [https://perma.cc/34DY-SHD4]; Andrea Neil, "Standing Committee on the Status of Women, Evidence, 44th Parliament, 1st Session, February 2, 2023" (last accessed 31 December 2023) at 3, online: Government of Canada <https://www.ourcommons.ca/Content/Committee/441/FEWO/Evidence/EV12200714/FEWOEV48-E.PDF> [https://perma.cc/H3KD-ZVMN].

132 See Gymnasts for Change Canada, "Canada Requires a Royal Commission into Abuse in Sport" (last accessed 31 December 2023) at 1, online: Government of Canada <https://www.ourcommons.ca/Content/Committee/441/FEWO/Brief/BR12173748/br-external/GymnastsForChangeCanada-e.pdf> [https://perma.cc/7V5N-3GXL]; Global Athlete, "Brief to the Committee for the Status of Women" (last accessed 31 December 2023) at 2, online: Government of Canada <https://www.ourcommons.ca/Content/Committee/441/FEWO/Brief/BR12170532/br-external/GlobalAthlete-e.pdf> [https://perma.cc/9ZHP-UUYP].

133 See Kirsty Duncan, "Standing Committee on the Status of Women, Evidence, 44th Parliament, 1st Session, June 15, 2023" (last accessed 31 December 2023) at 1, online: Government of Canada <https://www.ourcommons.ca/Content/Committee/441/CHPC/Evidence/EV12539662/CHPCEV88-E.PDF> [https://perma.cc/2LGS-T62Z].

134 See Scholars Against Abuse in Canadian Sport, "Hearing Survivors: Towards a National Inquiry of Maltreatment in Sport - A brief to The Standing Committee on the Status of Women and The Standing Committee on Canadian Heritage House of Commons Parliament of Canada" (last accessed 31 December 2023) at 1, online: Government of Canada <https://www.ourcommons.ca/Content/Committee/441/CHPC/Brief/BR12490364/br-external/ScholarsAgainstAbuseInCanadianSport-e.pdf> [https://perma.cc/3MV3-N5XG].

135 Specifically, the Standing Committee on the Status of Women, and the Standing Committee on Canadian Heritage: see Standing Committee on the Status of Women, "Time to Listen to Survivors: Taking Action Towards Creating a Safe Sport

have made separate calls for a public inquiry to investigate maltreatment in Canadian sport. A public inquiry is an official review ordered by a government of important events or issues for the purpose of establishing the facts and causes of an event or issue and making recommendations to the government.[136]

There is already a precedent for a public inquiry that examines Canada's sport system. From 1988 to 1990, a public inquiry was commissioned to investigate doping in Canadian sport. The inquiry was established following the Ben Johnson doping scandal at the 1988 Olympic Games. Charles Dubin, Associate Chief Justice of Ontario (as he then was), was appointed as commissioner. Although the Dubin inquiry was focused on doping, it extended to the core values of sport in Canada and made several findings and recommendations about the Canadian sport system that remain significant today in the context of systemic maltreatment – including the sport system's preoccupation with winning-at-all-costs, the autonomy and jurisdiction of sport organizations, and the role of government in regulating sport.[137]

It is easy to overlook the significance of the Dubin inquiry and the potential value of public inquiries as an instrument of policy change. Many of the Dubin Commission's recommendations related to doping have since been overtaken by global anti-doping efforts, and some of the findings and recommendations related to the culture of sport (i.e., a win-at-all-costs mentality and funding sport organizations based on high-performance

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Environment for all Athletes in Canada" (last accessed 31 December 2023) at 46, online: Government of Canada <https://www.ourcommons.ca/DocumentViewer/en/44-1/FEWO/report-7/> [https://perma.cc/HC92-ZZPQ]; and see Standing Committee on Canadian Heritage, "Safe Sport in Canada" (last accessed 29 June 2024) at 7 and 139, online: Government of Canada <https://www.ourcommons.ca/Content/Committee/441/CHPC/Reports/RP13203713/chpcrp12/chpcrp12-e.pdf> [https://perma.cc/RE9U-SL4R].

136 Jay Makarenko, "Public Inquiries in Canada" (last accessed 31 December 2023) at 1, online: repolitics <https://repolitics.com/features/public-inquiries-in-canada/> [https://perma.cc/MC8Q-2LX3].

137 Charles Dubin, "Commission of Inquiry into the use of drugs and banned practices intended to increase athletic performance" (last accessed 31 December 2023) at 529-531, online: Government of Canada <https://publications.gc.ca/collections/collection_2014/bcp-pco/CP32-56-1990-1-eng.pdf> [https://perma.cc/W55Z-FX6R] [Dubin, "Inquiry"].

success) have arguably not been addressed. It is, therefore, not surprising that some scholars have questioned the need for a public inquiry into maltreatment due to the risk that nothing will come of an inquiry and that it will be an expensive, lengthy, time-consuming process with recommendations that will be selectively implemented or ignored.[138] However, this is not a foregone conclusion.

Evidence indicates that public inquiries in Canada can have a transformative impact on policy. Inwood and Johns conducted a study of ten historically-important public inquiries covering different historical contexts, policy areas and types, and found that the majority resulted in transformative policy change that was either direct or diffuse.[139] In public inquiries whose impact was transformative and direct, each inquiry was created in response to a felt need for change, either by the public, by policy makers, or both.[140] Moreover, the traditional institutions of government were thought inadequate for the job. While it is true that, with respect to the public inquiries studied, policy change was imminent and that governments might have facilitated change without the inquiries, the inquiries were a catalyzing instrument to frame and deliver that change.[141] Thus, although policy change might have occurred without the interventions of these public inquiries, the governments of the day required a non-traditional policy instrument to manage expectations, produce new thinking, and make recommendations.[142]

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138 Peter Donnelly & Bruce Kidd, "Why a judicial inquiry into athlete abuse is not the right approach" (last accessed 31 December 2023), online: The Conversation <https://theconversation.com/why-a-judicial-inquiry-into-athlete-abuse-is-not-the-right-approach-199578> [Donnelly & Kidd]; Gretchen Kerr, "This U of T dean isn't calling for a national inquiry on abuse in Canadian sports. Here's why" (last accessed 31 December 2023), online: The Toronto Star <https://www.thestar.com/sports/amateur/this-u-of-t-dean-isn-t-calling-for-a-national-inquiry-on-abuse-in/article_6b6ded9b-de26-5d92-8c26-652852f41641.html> [https://perma.cc/8PLT-HF8W].

139 Gregory Inwood & Carolyn Johns, "Commissioners of inquiry and policy change: Comparative analysis and future research frontiers" (2016) 59:3 Canadian Public Administration 382 [Inwood & Johns].

140 *Ibid.*

141 *Ibid.*

142 *Ibid* at 397-398.

Despite calls for a public inquiry to investigate systemic maltreatment in Canadian sport, the executive branch of the federal government has declined to order one and instead has retained a three-person panel to conduct an investigation over 18 months beginning in 2024, with a mandate to provide preliminary and final reports with recommendations on governance, funding, and policy aimed at changing the culture of Canadian sport.[143] However, as discussed below, the government's justifications for retaining a three-person panel, as opposed to ordering a public inquiry, cast doubt on the effectiveness of the approach. Marier provides six key reasons for establishing public inquiries: (1) enhancing knowledge, (2) facilitating political compromise, (3) educating the general public, (4) avoiding blame, (5) delaying action, and (6) increasing public support for a course of action.[144] All of these objectives can be applied to the maltreatment context and highlight the advantages of a public inquiry over other types of review, such as the three-person panel recently announced by the federal government.

5.1. Enhancing Knowledge

With respect to the objective of enhancing knowledge, it is important to differentiate between what is known and unknown about maltreatment in Canadian sport. There is an existing body of research about the nature and incidence of maltreatment in sport, including its causes and organizational risk factors, some of which are specific to the Canadian context.[145] As Donnelly and Kidd note, the current knowledge of maltreatment in sport globally is the result of decades of research with consistent conclusions regarding the prevalence, causes, effects and prevention strategies; accordingly, a public inquiry "is unlikely to add much to our current understanding of the problem".[146] Although research has exposed the systemic organizational factors that contribute to maltreatment (see section 2), research has not been able to identify cohesive and transformative strategies to address it involving governments and sport

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143 Burke, *supra* note 75.

144 Patrik Marier, "The power of institutionalized learning: the uses and practices of commissions to generate policy change" (2009) 16:8 Journal of European Public Policy 1204-1223.

145 See section 2 of this paper.

146 Donnelly & Kidd, *supra* note 138.

organizations at all levels of the system. As a result, there is a gap in the information that law and policymakers need to address maltreatment; specifically, a gap in information relating to remedial measures that address the systemic organizational issues plaguing the sport system. A public inquiry with carefully drafted terms of reference could fill this informational gap with innovative recommendations. It is, therefore, curious that one of the federal government's justifications for not ordering a public inquiry into maltreatment in sport is that an inquiry would simply conclude that a "bad thing" has happened in sport, without providing any solutions.[147]

One of the strengths of a public inquiry, compared to other traditional instruments of policy change, is its ability to gather information from all levels of the sport system and subject that information to objective, expert review for the purposes of making factual findings and recommendations. Pursuant to legislation, the commissioners who lead public inquiries have the authority to compel the attendance of witnesses and the production of evidence, as well as engage the services of experts, technical advisors, and legal counsel.[148] The tremendous breadth, scope, and objectivity of this process is evident when comparing a public inquiry to other review processes – inside and outside of government. For example, with respect to the legislative branch of government, although standing committees can conduct studies of issues pursuant to standing orders of the legislature,[149] they are often unable to act as true policy investigatory bodies given their limited capacity and partisan dominance by politicians.[150]

The executive branch of government can also be limited in its policy-making function due to partisan issues as public servants report to and implement the policy direction of elected officials and their staff.[151] There is also the perception of bias if the public service (e.g., Sport Canada or a provincial or territorial sport ministry) is tasked with investigating or examining itself.[152] This risk of bias can be mitigated by retaining a third

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147 Burke, *supra* note 75.

148 *Inquiries Act*, RSC 1985, c I-11, s 4, 5, 11 [*Inquiries Act*].

149 See the Standing Committee on the Status of Women and its study on girls and women in sport, and the Standing Committee on Canadian Heritage and its study on safe sport.

150 Gregory Inwood & Carolyn Johns, *Commissions of Inquiry and policy change: a comparative analysis* (Toronto: University of Toronto Press, 2014) at 9 [Inwood & Johns, 2014].

151 *Ibid* at 10.

152 *Ibid*.

party person or panel of persons to conduct a review of an issue on behalf of the executive branch. The third party might be selected for having certain expertise in the area under investigation, as was seen in the case of the report prepared by McLaren Global Sport Solutions[153] into an independent mechanism to receive, investigate, adjudicate, and resolve disputes about violations of the UCCMS. Similarly, for the three-person panel recently established to investigate maltreatment in Canadian sport, the federal government has retained Justice Lise Maisonneuve (former Chief Justice of the Ontario Court of Justice) to lead the review with the support of special advisors Dr. Andrew Pipe (a sports medicine expert) and Noni Classen (the director of education and support services at CCES).[154] A significant limitation with such a third-party review conducted on behalf of the executive branch is that it is not able to compel the production of evidence or documents for the review. While the federal government may be willing to disclose certain records to a panel that it has retained, the panel will likely encounter difficulty obtaining the same types of records from provincial and territorial governments under access to information laws and from sport organizations that are under no legal obligation to comply with requests for documents from the third-party panel.[155]

The judicial branch of government may be seen as having a function and powers similar to a public inquiry; however, it is not an investigative

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153 See McLaren, Copeland & Tesic, *supra* note 35.

154 Government of Canada, "Meet the Commissioner and the two Special Advisors" (last accessed 19 May 2024), online: <https://www.canada.ca/en/canadian-heritage/campaigns/future-sport/biographies.html> [https://perma.cc/3CZL-FFM2].

155 The federal government has stated that the three-person panel will be modelled after the Truth and Reconciliation Commission (TRC): Burke, *supra* note 75. The TRC was established in accordance with the terms of an agreement that settled a class action lawsuit brought by individuals impacted by the Indian residential school system in Canada against the federal government and churches. The terms of this settlement agreement state that the TRC has no subpoena powers to compel attendance or participation in its activities or events. The TRC was able to obtain records from the federal government and churches due to terms in the settlement agreement that required the records to be disclosed to the TRC: Government of Canada, "Indian Residential Schools Settlement Agreement, Schedule N - Mandate for Truth and Reconciliation Commission" (last accessed 31 December 2023), online: <https://www.residentialschoolsettlement.ca/SCHEDULE_N.pdf> [https://perma.cc/6G3F-QNW8]. No such settlement agreement will underpin the three-person panel retained by the federal government to investigate maltreatment in sport.

body, but an adjudicative body. It can make legal and factual findings based on evidence introduced by parties to litigation. However, the function of the judicial branch is limited to the cases brought before it and is largely *ad hoc* and reactionary in nature by considering alleged misconduct or offences after they have occurred, as opposed to anticipatory of issues that have not yet occurred and may never occur.[156] As noted earlier in section 4.2, a single lawsuit is also limited to examining issues within one or more organizations that govern a single sport, as opposed to examining institutional issues across all sports and levels of the system.

Finally, outside of government, OSIC is an example of an institution that can conduct reviews and encourage policy change when it conducts sport environment assessments of sport organizations. However, a significant limitation of the sport environment assessment is that it only targets a specific sport organization and does not engage in a broader review of the relationship between higher-level and lower-level organizations within the sport hierarchy or the role of governments in regulating sport.

5.2. Facilitating Political Compromise

The objective of facilitating political compromise applies to systemic maltreatment in a unique way. At the federal government level, there appears to be multi-partisan agreement about the seriousness of maltreatment and that the federal government has some responsibility to address it.[157] As noted in section 2 of the paper, the federal government has led significant initiatives to address the systemic issues contributing to maltreatment (i.e., formal standards of acceptable conduct in the form of the UCCMS, an independent mechanism to investigate and adjudicate violations of those standards in the form of OSIC's Abuse-Free Sport program, and good governance standards for sport organizations). However, the effectiveness of these strategies is reduced without the uniform collaboration of provincial and territorial governments to implement the same measures in their respective jurisdictions. A joint federal-provincial and territorial public inquiry could provide a platform for governments to agree on their respective obligations and abilities to implement safe sport and good governance measures at all levels of Canadian sport. Although

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156 Inwood & Johns, 2014, *supra* note 150 at 10.

157 See Standing Committee on the Status of Women, *supra* note 135; Standing Committee on Canadian Heritage, *supra* note 135;.

commitments of inter-governmental cooperation to address safe sport have been expressed in the Red Deer Declaration for the Prevention of Harassment, Abuse and Discrimination in Sport (known as the "Red Deer Declaration")[158] and at meetings of federal, provincial, and territorial sport ministers,[159] there has been a lack of transparency about the extent of this cooperation. Further, the information that is publicly available suggests that only some provincial and territorial governments (e.g., BC, Quebec, Nova Scotia) are willing to implement initiatives that align with the federal government.[160] A public inquiry could bring transparency to these inter-governmental efforts and provide recommendations to assist with their implementation. A joint federal-provincial and territorial public inquiry would also address a concern expressed by the federal government about a singular federal public inquiry, which is that it would require negotiations with provinces and territories regarding the federal inquiry's scope of authority to investigate maltreatment in sport at the provincial, territorial and local levels.[161] The federal government expressed this concern to justify its decision to retain a three-person panel to investigate maltreatment instead of ordering a public inquiry; however, it is not clear how a three-person panel addresses this jurisdictional issue.

5.3. Educating the General Public

Despite recent media attention about incidents of maltreatment in Canadian sport, the general public is likely unaware of some of the organizational factors contributing to maltreatment in sport or the jurisdictional challenges that have impeded efforts to address maltreatment at all levels of the sport system. A public inquiry could shed light on these

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158 Conference of Federal-Provincial-Territorial Ministers Responsible for Sport, Physical Activity and Recreation, "Red Deer Declaration - For the Prevention of Harassment, Abuse and Discrimination in Sport" (last accessed 31 December 2023), online: Canadian Intergovernmental Conference Secretariat <https://scics.ca/en/product-produit/red-deer-declaration-for-the-prevention-of-harassment-abuse-and-discrimination-in-sport/> [https://perma.cc/52GC-G9AZ].

159 Jamie Strashin & Lori Ward, "Federal, provincial sports ministers to discuss safe sport solutions at meetings in P.E.I." (last accessed 31 December 2023), online: CBC <https://www.cbc.ca/sports/shattered-trust-canada-safe-sport-meeting-pei-1.6751185> [https://perma.cc/Z8WP-F3YL].

160 See section 3 of this paper.

161 Burke, *supra* note 75.

issues and challenges through public hearings and the publication of the commissioner's report.[162] This may be particularly important for some segments of the population who are unaware that maltreatment is pervasive in Canadian sport or who, for example, do not view a focus on high-performance success or a win-at-all-costs mentality as problems that require fixing. Further, to the extent that public recommendations from a public inquiry would impact lower levels of sport where volunteers occupy administrative, coaching and officiating positions, the inquiry would provide the necessary context for those volunteers to understand why their roles and responsibilities might change to better prevent and address maltreatment. In contrast, the work and reports of the three-person panel retained by the federal government may not be as transparent, and therefore may not serve the same educative function as a public inquiry.[163]

5.4. Avoiding Blame

Governments may reasonably be concerned that a public inquiry could become a litigious process and lead to findings or recommendations that place blame or liability on them. For example, one of the justifications cited by the federal government to retain a three-person panel instead of ordering a public inquiry was to avoid a litigious process that would put victims in a vulnerable position by exposing them to cross-examinations to prove their claims.[164] However, that is not the purpose of a public inquiry and expectations to the contrary can be addressed by carefully drafted terms of reference that guide the inquiry and clarify its purpose. As noted by Justice Dubin in his Commission Report:

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[162] In the case of a federal public inquiry, federal Cabinet decides whether to make a commission's report public; however, most reports are tabled in the House of Commons at the time of their release and made available to the public: Government of Canada, "About commissions of inquiry" (last accessed 31 December 2023), online: <https://www.canada.ca/en/privy-council/services/commissions-inquiry/about.html> [https://perma.cc/6T3X-MLWH].

[163] Although there would be public pressure to release a final report, the federal government would have the ultimate discretion to publish the report, including editorial control over what is published. The panel's working papers and draft reports in the custody or control of the federal government would only be accessible under the *Access to Information Act*, RSC 1985, c A-1, and could be exempt from disclosure (in whole or in part) under that Act.

[164] Burke, *supra* note 75.

> The function of a commission of inquiry is not always understood. A commission of inquiry is not a trial. No one is charged with any criminal offence, nor is anyone being sued. There is, to use legal jargon, no *lis inter partes*. There is no dispute between parties as such, and no legal rights are determined. It is intended to be an independent, objective inquiry into the subject matters referred to it [...] with a view to ascertaining what has transpired, to identify the problem areas, to define the issues, and to seek a way of correcting the errors of the past so that they will not recur."[165]

In other words, a public inquiry should not be viewed as a mechanism to provide wronged parties with the opportunity to be heard for the purpose of establishing wrongdoing or receiving reparations for harms experienced. Other mechanisms, including OSIC and civil litigation, are better suited to serve those important objectives (see sections 4.1 and 4.2 above).[166]

5.5. Delaying Action and Increasing Public Support

Finally, with respect to the objectives of delaying action and increasing public support for a course of action, it is important to understand how a public inquiry would complement, and not seek to rollback, federal initiatives that address maltreatment, such as the UCCMS and OSIC. As noted in sections 3 and 4, there are several limitations with the UCCMS and OSIC that prevent them from effectively addressing maltreatment at all levels of the sport system, including the systemic organizational factors that contribute to maltreatment. However, many of these limitations have already been acknowledged by the government and do not need to be reinvestigated as part of a public inquiry.[167] Instead, a public inquiry could focus on solutions to those limitations of the UCCMS and OSIC, with terms of reference that support such a focus. For example, Kidd, Kerr and Donnelly note that a public inquiry could focus on issues of governance, the exercise of jurisdiction by sport organizations in the sport hierarchy, and the role of governments and broader public sector organizations that fund sport organizations:

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165 Dubin, "Inquiry", *supra* note 137 at xxvii.

166 If a public inquiry reveals that those mechanisms are ineffective at providing such remedies, then the inquiry can recommend additional mechanisms such as the establishment of a compensation board for victims or survivors of maltreatment: see Australian Sports Commission, "ASC Restorative Program - Overview" (last accessed 31 December 2023), online: <https://www.ausport.gov.au/about/asc-restorative-program> [https://perma.cc/YP2H-SAVT].

167 See *supra* note 85 regarding making OSIC a standalone entity outside of SDRCC.

> If there is to be a national inquiry, it would be more productive to investigate (i) the woeful lack of transparency and accountability in Canadian sports governance; (ii) the lack of adequate athlete representation; (iii) the disconnect between the activities at the national level and those at the provincial/territorial and municipal levels; and (iv) the contributions of public bodies such as municipalities, colleges, and universities. Such an inquiry should also investigate (v) the relationship between Sport Canada and the NSOs.[168]

Additionally, with respect to the role of governments, a public inquiry could consider the need for a centralized regulatory body or coordinated network of federal, provincial, and territorial regulatory bodies that have legislative authority to regulate sport organizations – as an alternative to the limited funding role that governments have today. While a three-person panel retained by the federal government could also focus on these issues, it does not have statutory powers to compel the production of information needed to fully examine the issues and to recommend solutions to address them, as mentioned above.

In summary, there may be value in a joint federal-provincial and territorial public inquiry in Canada that focuses on the organizational, jurisdictional, and regulatory issues described above. A public inquiry would be better positioned than traditional government and non-government institutions (e.g., legislative standing committees, third parties retained by the executive branch, the judicial branch, and OSIC) to investigate these issues in lights of its statutory powers that enable the gathering of information, the objective and expert review of that information, and the formation of recommendations that can result in transformative policy change for the sport sector.

6. NEW SUPERVISORY MODEL

6.1. Introduction to Regulatory Governance

One of the gaps across the Canadian sport system and within a large number of sport organizations that has become painfully apparent relates to the regulatory function of sport organizations, and the sport system at large, in terms of their capacity and capability to address the organizational factors contributing to maltreatment on a system-wide basis. Jurisdictional, structural, and regulatory impediments have collided to produce a

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168 Kidd, Kerr & Donnelly, "Brief", *supra* note 50 at 5-6.

dysfunctional system. As noted by Roberts et al., interventions that only tackle individual cases, that focus on the purported individual perpetrator or that maintain the current regulatory *status quo* within organizations will not resolve the issues that have plagued sport for some time.[169] There must be a systemic solution for a systemic problem.

In this paper, we propose, as a starting point, to think about how sport organizations and the sport system as a whole are regulated and how that regulation can become more accountable and transparent to the sport community and the public at large. The term "regulatory governance" is a relatively recent way of conceptualizing regulatory systems. Regulatory governance is concerned with the institutional context in which rules are designed and implemented, who the relevant regulatory actors are, as well as the regulatory process itself including and, most particularly, the drafting, monitoring and enforcement of rules.[170]

6.2. Systems of Regulatory Governance and their Application to Current Canadian Sport System

Three basic systems of regulatory governance can be identified. First, in a system of self-regulation, the entity being regulated is responsible for all aspects of the regulatory process, including the creation, implementation, and enforcement of rules. Second, a direct, non-arm's length relationship can exist between the regulator and the regulated entity wherein the regulator designs, monitors and enforces rules for the regulated entity. Such a relationship could be found in the contractual relationship between an organization and its members. Third, an independent party or agency that

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169 Roberts et al, *supra* note 5 at 24.

170 Poul F. Kjaer & Antje Vetterlein, "Regulatory governance: rules, resistance and responsibility" (2018) 24:5 Contemporary Politics 497. Other scholars have similar definitions of regulatory systems. Levi-Faur defines regulation as "... the promulgation of an authoritative set of rules, accompanied by some mechanism for monitoring and promoting compliance with those rules" and notes that it is a key aspect in ensuring the consistent and effective application of an organization's governing rules and regulatory system: David Levi-Faur, *Handbook on the Politics of Regulation* (Edward Elgar Publishing, 2011) at 103 [Levi-Faur]. Scott defines regulation as "any process or set of processes by which norms are established, the behaviours of those subject to the norms monitored or fed back into the regime, and for which there are mechanisms for holding the behaviour of regulated actors within acceptable limits of the regime": Colin Scott, "Analysing Regulatory Space: Fragmented Resources and Institutional Design" Summer Edition, Public Law Journal 283.

is arm's length from the regulated entity is introduced into the regulatory process to create, implement, or enforce rules (or any combination of these roles) in relation to the regulated entity. There can be a number of combinations and permutations of these three basic systems creating an array of hybrid processes depending on the needs, goals, and circumstances of regulation.[171]

In the case of sport, systems of regulatory governance are often ill-defined, disconnected and either ignored or misapplied. However, in general, the Canadian sport system has been characterized as a self-regulatory system of governance. The self-regulating entity is the sport organization – it develops, administers, and enforces its own rules to regulate itself and its members. These members consist of lower-level organizations, particularly in the case of NSOs and PTSOs. It is only at the local grassroots level that the members of a sport organization (e.g., a local club) are individual participants. To the extent that a higher-level organization, such as an international sport federation, NSO, or PTSO, exercises regulatory authority over lower-level member organizations, the self-regulatory system also has features of the second system of regulatory governance described above and may be considered hybrid in nature.

As discussed in section 3, within this predominantly self-regulatory system, sport organizations in Canada have not been incentivized to independently address the organizational factors contributing to maltreatment within their organizations (or their member organizations). As a result, the adoption of initiatives, such as the Canadian Sport Governance Code, the UCCMS, and OSIC's Abuse-Free Sport program have been mandated by the federal government (and some provincial and territorial governments), pursuant to their funding authority over sport organizations. This involvement of governments represents a shift away from a largely self-regulatory system to a further hybridized system that now has features of all three regulatory governance systems described above.

The Canadian Sport Governance Code and the UCCMS are rules drafted by a third-party entity (COC and OSIC,[172] respectively) that are endorsed by the federal government and imposed by the federal government

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171 Levi-Faur, *ibid*; Eric L Windholz, "Sports' Global Anti-Doping Regulatory Regime: The Challenges and Tensions of Polycentricity and Hybridity" (2022) 34:1 Bond Law Review.

172 See *supra* note 42 above regarding the first iteration of the UCCMS. The current version of the UCCMS, and subsequent versions, are authored by OSIC.

(acting as a regulator) on federally-funded sport organizations. OSIC, as the national body that enforces the UCCMS, also plays the role of independent regulator over sport organizations with which it has contracts. OSIC's regulatory role involves investigating and adjudicating violations of the UCCMS and, to a lesser extent, conducting sport environment assessments. However, as discussed in section 4.1, OSIC has limited authority to issue sanctions against sport organizations and is reliant on the government to issue financial sanctions against (publicly funded) sport organizations for non-compliance relating to the UCCMS. Similarly, the COC is not a regulator in relation to the Canadian Sport Governance Code as it is the federal government (and not the COC) that has decided to make the adoption of the Governance Code mandatory for federally funded NSOs and to enforce compliance with the requirement through funding agreements.[173] Despite these external encroachments by the federal government and OSIC, the Canadian sport system as a whole remains largely self-regulated and, as a result, has not been required to address the systemic organizational factors contributing to maltreatment. Three main reasons can be identified for this.

First, the regulatory roles of the federal government and OSIC are not enshrined in legislation; rather, they are contingent on the existence of a contractual relationship between a sport organization and the regulator. An NSO that chooses not to enter into contracts with the federal government and OSIC (and therefore forgoes the privilege of receiving public funding) is not subject to their external regulatory oversight. If such an NSO decides to incorporate the UCCMS or the Canadian Sport Governance Code into its own rules, it does so voluntarily pursuant to its autonomous authority in a self-regulatory system. While such independent action may seem unlikely for an NSO due to its reliance on federal funding (or its desire to maintain positive relations with the federal government), the situation is different for PTSOs and lower-level organizations, which leads to the second reason for the limited regulatory reach of the federal government and OSIC.

The second reason is that the federal government and (for the most part) OSIC do not have direct contracts with PTSOs and lower-level sport

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[173] While it is possible for the COC to act as a regulator of NSOs pursuant to its powers and duties under the Olympic Charter, it has not historically exercised such a formal regulatory role.

organizations.[174] As discussed in sections 3 and 4.1, any authority of the federal government or OSIC over PTSOs and local sport organizations is inhibited by the lack of jurisdictional authority exercised by NSOs over lower-level organizations. More specifically, if NSOs are not requiring PTSOs and lower-level organizations to adopt the Canadian Sport Governance Code or UCCMS, then the federal government's regulatory initiatives have no impact on sub-national levels of sport. Similarly, if NSOs do not require PTSOs or local organizations to become signatories of OSIC's Abuse-Free Sport program, then OSIC may never have direct authority over those organizations (unless those organizations join voluntarily). While some provincial and territorial governments (e.g., British Columbia, Quebec, and Nova Scotia) have exercised their funding authority over PTSOs to implement safeguarding and good governance initiatives that generally align with federal initiatives, there remains a lack of intergovernmental cohesion and collaboration leading to a patchwork of initiatives and gaps in the system.

Third, and finally, even where a federal, provincial, or territorial government or OSIC has contractual authority over a sport organization, they do not have adequate powers to enforce compliance. As discussed earlier, the only penalty that exists for a sport organization's non-adoption or non-compliance with rules (e.g., the UCCMS or the Canadian Sport Governance Code), is the removal of public funding by governments. Assuming the organization is fiscally self-sufficient (through its financial reserves, sponsors, or member or user fees), the removal of public funding will not impact the sport organization's ability to operate or to be recognized within the sport system as the governing body for its sport at a particular level. The removal of public funding is also different from the government's ability to enact legislation to codify rules and impose administrative fines or provincial offence proceedings (with fine penalties) for non-compliance with those rules. The imposition of such fines would have a general deterrent effect on the sport sector and demonstrate the government's

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[174] In the case of OSIC, one exception being PTSOs for volleyball that have entered into such contracts with OSIC as a result of the strong exercise of jurisdictional authority by the NSO for volleyball (Volleyball Canada) over lower-level sport organizations: see *supra* note 43.

commitment to addressing safe sport. However, examples of such legislative action are not common in Canadian sport.[175]

In order for safe sport initiatives – that address organizational factors contributing to maltreatment – to be adopted and more effectively enforced at all levels of the sport system there must be a transformative shift in how sport is regulated in Canada. The three systems of regulatory governance described above provide a theoretical framework to examine options for regulatory reform, and such options can be informed by comparator regulatory systems in other sectors and jurisdictions. The options for regulatory reform discussed below are described in necessarily broad terms as they are only suggestions at this stage. Further analysis is required to examine the details of each option and evaluate their potential merit, which, ideally, would occur in the context of a public inquiry or, in the absence of a public inquiry, a third-party review of the sport system.

6.3. Systems of Regulatory Governance as Options for Reform

6.3.1. Statutory-Based Self-Regulation

With respect to a system that is self-regulatory, one option is statutory-based self-regulation that ensures public accountability and state supervision.[176] This describes a system of self-regulation that is granted by statute with conditions intended to protect the public interest, ensure that the self-regulating sector is accountable to participants and the public at large, and that the government has statutory authority to intervene in the governance or operations of the self-regulated entity, if necessary. This is the model used for many professions in Canada, including legal professionals

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175 For example, in 2018, the Province of Ontario enacted *Rowan's Law (Concussion Safety), 2018*, SO 2018, c 1, which requires every amateur competitive sport organization in Ontario to comply with certain rules regarding concussion safety. However, the legislation does not include any penalty for non-compliance. Typical penalties for non-compliance with a provincial regulatory statute are a fine (if an individual or corporation was convicted of a provincial offence), an administrative monetary penalty, or both.

176 Trudo Lemmens & Kanksha Mahadevia Ghimire, "Regulation of Health Professions in Ontario: Self-Regulation with Statutory-Based Public Accountability" (2019) 19:3 Revista de Direito Sanitário / Journal of Health Law 124 [Lemmens & Ghimire].

(i.e., lawyers and paralegals) and regulated health professionals (e.g., physicians, nurses, etc.).[177]

This model differs from the current self-regulatory sport system, which, as discussed in section 3, arises from the historically private and autonomous nature of sport and the tendency of Canadian governments to defer to this autonomy by not enacting laws to specifically regulate the sport system. In contrast, under this option, a statute would specifically authorize a sport organization (e.g., an NSO or PTSO) to autonomously regulate its sport at the national, provincial, or territorial level, govern its members, and make its own rules, subject to certain statutory conditions or restrictions. These conditions would be determined by the government in consultation with the sport sector and general public and would be included in the legislation. Examples of possible statutory conditions include minimum standards for a sport organization's board of directors (to ensure diversity, impartiality, competence, and athlete representation), overseeing and being held accountable for lower-level member organizations, adopting the UCCMS, and implementing certain fundamental principles in the organization's governance and operations, such as a bill of rights for athletes that values athlete well-being over winning-at-all-costs. The legislation could require the sport organization to report to the government (or some other entity) on its compliance with the legislation on a periodic basis (e.g., annually) and in response to *ad hoc* requests from the government. A sport organization's non-compliance with these requirements could result in the government appointing a third party (e.g., a supervisor) to replace the organization's board of directors to ensure that the organization continues to operate while it undertakes remedial measures to become compliant and that participants are not penalized for the organization's governance or operational failures.[178] Finally, to prevent organizations from avoiding or opting-out of the statutory scheme, the legislation would prohibit an unauthorized organization from holding itself out to the public as the governing body for a sport at the national, provincial or territorial level.[179]

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177 See *Law Society Act*, RSO 1990, c L.8; *Regulated Health Professions Act, 1991*, SO 1991, c 18 [RHPA].

178 This, of course, does not preclude the use of escalating remedial measures to effect compliance.

179 See RHPA, *supra* note 177, s 34.

There are already precedents for this type of statutory-based self-regulatory model in sport.[180] In India, for example, the government has enacted a National Sports Code (and has proposed a draft National Code for Good Governance) to authorize the self-regulating status of NSOs, subject to their compliance with certain restrictions aimed at improving transparency, accountability, and fairness in sports governance.[181] If a NSO fails to comply with the requirements in the National Sports Code, then its board of directors may be replaced with a court-appointed committee of administrators to govern and operate the NSO until compliance is achieved.[182]

A significant limitation of a pure self-regulating model in sport is that it does not contemplate the use of an independent third party, such as OSIC, to investigate and adjudicate violations of the UCCMS. From the perspective of athletes, advocacy groups, and scholars, a sport organization's internal investigation and adjudication of UCCMS violations would be viewed as a step backwards in the fight for safe sport in Canada. Without an independent third party, the sport organization would be responsible for

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180 The use of a statutory-based self-governance model in Canada is not far-fetched, as the foundation for such a model already exists in the context of combative sports. *Criminal Code*, *supra* note 37, s 83; prohibits "prize fights" (defined broadly to capture combative sports, such as boxing, kickboxing, and mixed martial arts), but exempts from the prohibition sports or events approved by a provincial or territorial government through legislation. This framework has led provinces and territories to make orders-in-council or enact statutes to recognize the self-regulatory authority of PTSOs to organize combative sport events, subject to certain restrictions, such as compliance with the funding conditions imposed by the provincial or territorial government on publicly funded PTSO: see Ontario's Order in Council, 1087/2017 and *Combative Sports Act, 2019*, SO 2019, c 7, Sched 9.

181 Government of India, "National Sports Development Code of India, 2011" (last accessed 31 December 2023), online: Ministry of Youth Affairs and Sports <https://yas.nic.in/sites/default/files/File918.compressed.pdf> [https://perma.cc/6FLW-P76L]; Government of India, "(Draft) National Code for Good Governance in Sports, 2017" (last accessed 31 December 2023), online: Ministry of Youth Affairs and Sports <https://yas.nic.in/sites/default/files/Draft%20National%20Code%20for%20Good%20Governance%20in%20Sports.pdf> [https://perma.cc/RG2U-Z4CE].

182 ESPN Staff, "Indian sports under CoA: National Federations under the scanner" (last accessed 31 December 2023), online: ESPN <https://www.espn.com/espn/story/_/id/34419463/indian-sports-coa-list-national-federations-supreme-court> [https://perma.cc/3HG3-QYBA].

investigating and adjudicating violations of the UCCMS, which would raise conflict of interest concerns and perpetuate the power imbalance between the organization and athletes – both of which are organizational factors identified in section 2 that contribute to systemic maltreatment. Indeed, this aspect of the self-regulating model has been identified as a weakness in other sectors, such as legal and health professionals, where the self-regulating body has been criticized for being more concerned about its self-image than protecting the public when managing complaints of misconduct.[183]

The necessary involvement of an independent third party would move the regulatory model away from a truly self-regulatory system to a hybrid system involving an independent entity with limited regulatory functions.[184] There are precedents for this type of hybrid statutory-based self-regulatory model in sport. In the United States, for example, the *Ted Stevens Olympic and Amateur Sports Act*, recognizes the autonomy of the United States Olympic and Paralympic Committee (USOPC) and NSOs, but imposes certain conditions on their autonomy,[185] including the use of an independent third party (i.e., the U.S. Center for Safe Sport) to investigate and adjudicate violations of a universal code of conduct relating to maltreatment (i.e., the U.S. Safe Sport Code).

6.3.2. Non-Arm's Length Regulator

With respect to the second system of regulatory governance, there are options to strengthen the role of higher-level sport organizations as non-arm's length regulators of lower-level sport organizations. As discussed in section 3, higher-level organizations, such as NSOs and PTSOs, have not typically exercised their jurisdictional authority over lower-level organizations for a variety of reasons, including the lack of external

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183 See Lemmens & Ghimire, *supra* note 176 at 156; Philip Slayton, *Lawyers Gone Bad - Money Sex And Madness In Canada's Legal Profession* (Penguin Canada, 2008).

184 The U.S. model is an example of such a hybrid system. Although the USOPC and NSOs in the United States are granted self-regulating status by legislation (subject to certain conditions), they are required to use an independent third party (the U.S. Center for Safe Sport) to manage complaints about maltreatment: *United States Code*, Title 36, Ch 2205 [36 USC].

185 Another condition requires the USOPC and NSOs to ensure that athletes comprise a minimum of 20 percent of the membership and voting power of the organizations: 36 USC, *ibid*, s 220504.

compulsion to do so from federal, provincial, and territorial governments that fund NSOs and PTSOs. Higher-level organizations could be required to ensure that lower-level organizations adopt the Canadian Sport Governance Code, the UCCMS, and become signatories of the OSIC's Abuse-Free Sport program by expanding the conditions to which the higher-level organizations are subject under funding agreements with governments. For example, Sport Canada could revise its funding contribution agreements and mandate that all funded NSOs ensure that the UCCMS is adopted by all lower-level organizations, including PTSOs and local clubs. Alternatively, the UCCMS itself could be the source of such expansion. Currently, the UCCMS is focused on individual misconduct within an organization that has adopted the Code (an "adopting organization"). However, the UCCMS does not impose obligations on an adopting organization to ensure that the UCCMS is implemented by lower-level organizations that are under the jurisdictional authority of the adopting organization. This is a missed opportunity to ensure that the UCCMS applies to all levels of the sport system.

This gap in the UCCMS is also inconsistent with how anti-doping rules operate. In most sports, anti-doping rules emanate from the World Anti-Doping Agency (WADA) and its World Anti-Doping Code (WADC). All of the provisions in the WADC are mandatory in substance and must be followed, as applicable, by WADA and each anti-doping organization that has signed the WADC, such as international sport federations and national Olympic committees.[186] Importantly, these signatories of the WADC must ensure that each lower-level organization over which they exercise regulatory authority complies with the WADC. For example, an international sport federation must ensure that the policies, rules, and programs of its member NSOs comply with the WADC, and must take appropriate action to enforce this compliance.[187] Similarly, a national Olympic committee must ensure that the policies, rules, and programs of its affiliated NSOs comply with the WADC, and must take appropriate action to enforce this compliance.[188]

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[186] World Anti-Doping Agency, World Anti-Doping Code 2021 (last accessed 31 December 2023) at 16, online: <https://www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf> [https://perma.cc/Y94A-TTNL] [WADC].

[187] *Ibid* at 122.

[188] *Ibid* at 126.

These WADC obligations on international sport federations and national Olympic committees have been essential in ensuring that globally-harmonized anti-doping rules permeate down to all levels of sport. In the maltreatment context, similar obligations could be imposed on NSOs and PTSOs to exercise their jurisdictional authority and ensure that the UCCMS applies to all levels of Canadian sport. However, as discussed in section 3, the regulatory power of an NSO or PTSO over lower-level organizations will still be limited if they do not have the financial, human, and information resources needed to effectively exercise it. Additionally, even where the necessary resources exist, an NSO or PTSO may be reluctant to impose currently available sanctions for non-compliance on lower-level organizations, such as suspending or revoking their membership, without having a contingency plan to ensure that athletes at those levels would not be unduly impacted by any such sanction.[189]

6.3.3. Independent Regulator

With respect to the third system of regulatory governance involving an independent regulator that creates and enforces rules, the government or an administrative authority could exercise this role pursuant to statutory authority. An administrative authority is created by statute to act either as an agent of the government or an independent entity with a board of directors appointed in full or in part by the government. The regulatory operations of the administrative authority may be funded by the government and/or the sector that it regulates through user or licensing fees. The administrative authority is made accountable to the public and to the government through the legislation that creates it, and, in many cases, the authority carries out regulatory functions previously provided by the government over matters, such as consumer and public safety.[190] Several provinces and territories in Canada have created administrative authorities to regulate various sectors and subject matters, including electrical safety,

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189 A contingency plan may be needed to avoid a disproportionate sanction that could be legally challenged. For example, at the Olympic Games and other major international sport events, athletes are able to participate as "neutral" athletes or with other restrictions when their responsible national sport organization is suspended by the entity hosting the event.

190 Consumer Council of Canada, "Improving the Effectiveness of Consumer Representation on Delegated Administrative Authorities" (last accessed 31 December 2023), online: Government of Canada <https://ised-isde.canada.ca/site/search-research-database/en/node/11302> [https://perma.cc/GU62-S77V].

recycling programs, home building, motor vehicle dealers, and retirement home operators.[191]

In the sport context, some jurisdictions outside of Canada have created administrative authorities to regulate sport, and NSOs in particular. In Spain, for example, the Consejo Superior de Deportes (Higher Sports Council) is an administrative agency of the Spanish government created by legislation to oversee sport in Spain.[192] The Council is independent from NSOs in Spain and has broad legislative authority to approve the creation and dissolution of NSOs, ratify the statutes and regulations of NSOs, approve the implementation of NSOs' objectives and sport programs, authorize NSOs' membership in international sport federations, provide funding to NSOs, and conduct audits of NSOs' finances and governance.[193]

OSIC could fulfill the role of an administrative authority that regulates NSOs in Canada. The *Physical Activity and Sport Act*[194] could be amended or a new statute could be enacted to make OSIC an administrative authority with powers to regulate the governance and operations of NSOs (such as through the granting of licences that allow NSOs to operate), conduct inspections of NSOs, compel the production of information from NSOs, and sanction NSOs for non-compliance with certain rules and standards set out in the legislation or established by OSIC, such as the UCCMS and good governance standards. However, the jurisdiction of the OSIC as an administrative authority would be limited to NSOs due to the inherent limitations of the federal government's legislative authority under the *Constitution Act, 1867*.[195] To regulate PTSOs (and possibly lower-level

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191 See *Safety and Consumer Statutes Administration Act, 1996*, SO 1996, c 19. See also specific statutes creating delegated administrative authorities, such as the Electrical Safety Authority created under the *Electricity Act, 1998*, SO 1998, c 15, Sched A, and the Retirement Homes Regulatory Authority created under the *Retirement Homes Act, 2010*, SO 2010, c 11. Finally, see Administration Delegation Regulation, BC Reg 136/2004 made under the *Safety Standards Act*, SBC 2003, c 39, and Government of Alberta, "Delegated Arrangements" (last accessed 31 December 2023), online: <https://www.alberta.ca/delegated-arrangements> [https://perma.cc/8G4S-3PXP].

192 Law 39/2022 on Sport, Statutes of Spain 2022 [Law 39/2022].

193 *Ibid*, s 14(g), (h), (i), (m).

194 *Physical Activity and Sport Act*, SC 2003, c. 2 [*Physical Activity and Sport Act*].

195 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5., ss 91-92.

organizations) provincial and territorial governments would need to create their own administrative authorities by legislation.[196]

This need for administrative authorities at the federal, provincial, and territorial levels that operate based on uniform principles is a potential barrier to this option due to the collective political will required to execute it. This barrier applies not only to this third system of regulatory governance, but also any system of regulatory governance that requires federal, provincial, and territorial government action to implement (e.g., statutory-based self-regulation or externally mandating that NSOs and PTSOs act as non-arm's length regulators of lower-level organizations). However, the barrier is not insurmountable and can be addressed by coordinated intergovernmental actions at the federal, provincial, and territorial levels through shared-cost programs.

An existing example of coordinated intergovernmental action through a shared-cost program involves Canada's publicly funded health care system (also known as "Medicare").[197] The *Canada Health Act* is a federal statute that establishes criteria and conditions related to publicly funded health services (e.g., physician and hospital services) that provinces and territories must fulfill through their respective provincial and territorial health insurance plans in order to receive federal government funding under the Canada Health Transfer.[198] A similar statutory framework and funding model could be used to create a coordinated pan-Canadian regulatory governance model for sport. The federal government could enact a statute that creates a national administrative authority to regulate NSOs at the federal level based on certain criteria relating to the administrative authority's mandate, objectives, and powers as a regulator. The statute would also create a new shared-cost program for safe sport (i.e., a Canada

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196 While it is possible to have only a federal administrative authority that regulates NSOs and seeks to require NSOs to exercise their jurisdictional authority over lower-level organizations (including PTSOs), this approach may be ineffective for the reasons discussed in section 3. As a result, it would be beneficial to have separate administrative authorities at the provincial and territorial level that could directly regulate the PTSOs, and either directly regulate local sport organizations or require PTSOs to exercise certain authority over lower-level member organizations.

197 Another example of a shared-cost program is the Canada Social Transfer. Through this transfer, the federal government provides funding support for provincial and territorial social assistance programs, subject to certain conditions.

198 *Canada Health Act*, RSC 1985, c C-6.

Sport Transfer). Through this shared-cost program, the federal government would agree to provide financial support for safe sport initiatives at the provincial, territorial and local levels, but only if provincial and territorial governments agree to comply with certain stipulations. These stipulations would require a provincial or territorial government to create an administrative authority to regulate sport organizations at the provincial, territorial and local levels using the same criteria upon which the national administrative authority is based.

Subsection 7(1) of Canada's *Physical Activity and Sport Act*[199] already contemplates such a shared-cost program for sport; however, it has never been utilized by the federal government. The utility of the federal spending power is that it allows the federal government to indirectly regulate sport at the provincial, territorial, and local levels in a manner that would otherwise not be possible through legislation due to the constitutional limits on the federal government's legislative authority.[200] Although the use of the federal spending represents an encroachment on provincial and territorial objects,[201] it would likely be welcomed by provincial and territorial governments as they recognize the significant financial investment needed to establish an independent third party regulator for sport.

In summary, a new regulatory framework may be necessary to respond to the seemingly intractable deficiencies of the current self-regulatory framework that have prevented the Canadian sport system from addressing the organizational factors contributing to systemic maltreatment. Working from the three basic systems of regulatory governance previously described, a number of options for regulatory reform can be identified, some of which respond to the major flaws in the current way sport governs itself and present opportunities for the implementation of safe sport measures at all levels of the system that are more cohesive, harmonized, and enforceable than what exists today.

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199 *Physical Activity and Sport Act*, *supra* note 194.

200 Peter Hogg, *Constitutional Law of Canada* (Toronto: Thomson Canada Limited, 2007) at 6.8(a).

201 *Ibid.*

7. CONCLUSION

Canadian sport is seemingly trapped in a system that operates to enable and even perpetuate maltreatment within its ranks. The source of maltreatment goes beyond the individual perpetrator to include the sport organization. Acknowledging the sport organization as a contributing source of the maltreatment does not excuse the behaviour of individual perpetrators, some of whom actively pursue opportunities to participate in the sport system for the purpose of engaging in maltreatment. Rather, examining the role of the sport organization allows for an understanding of the organizational or institutional factors that can shape the behaviour of individuals capable of engaging in maltreatment due to their positions of authority. These organizational factors relate to relationship structures, policies and operations, governance, and ideologies. These organizational factors are systemic in nature, embedded in the very fabric of sport and in many sport organizations. It is necessary to tackle these organizational factors at all levels of the Canadian sport system in order to find a way forward to prevent and address maltreatment in sport.

Unfortunately, the Canadian sport system has been unable or unwilling to address the organizational factors contributing to maltreatment, particularly at the provincial, territorial, and local levels of sport. This inaction has not been remedied by the intervention of NSOs, PTSOs, or governments. There is a historical absence of jurisdictional authority exercised by NSOs and PTSOs over lower-level organizations, and there is an inherent weakness in using federal, provincial, and territorial government funding contracts as a form of regulatory control over sport organizations. Attempts to address the organizational factors contributing to maltreatment in sport have only been imposed at the federal level on NSOs through conditions attached to public funding. Efforts to implement these measures at sub-national levels of sport have been inconsistent and lacked harmonization. Further, the measures do not address all types of organizational factors contributing to maltreatment, such as power imbalances between athletes and individuals in positions of authority within sport organizations, and ideologies that prioritize winning over athlete well-being. Although future federal initiatives, such as a sport integrity framework and a policy on safeguarding child athletes, could help address these outstanding organizational factors, the initiatives will not be effectively

implemented beyond the federal level without a change to the regulatory framework for sport.

While the creation of OSIC as a national independent mechanism to investigate and adjudicate violations of the UCCMS has been a positive development in the pursuit of safe sport, it is ultimately flawed due to its largely singular focus on individual misconduct, its limited jurisdiction to accept complaints, conduct investigations and issue enforceable sanctions, and its financing model. Collectively, these factors prevent OSIC from acting as a true regulator that can hold sport organizations at all levels of the system accountable for contributing to maltreatment. Faced with this regulatory dysfunction and lack of external regulation in sport, some Canadian athletes have had to file class action lawsuits based on the tort of systemic negligence in an attempt to trigger systemic organizational change in certain sports, such as ice hockey, gymnastics, and artistic swimming. Although such class action lawsuits have the potential to address the organizational factors contributing to maltreatment within a single sport organization or across multiple sport organizations that govern a single sport, they are reactive and *ad hoc* in nature, and may not produce the kind of transformative change needed to address maltreatment at all levels of Canadian sport.

A joint federal-provincial and territorial public inquiry may be better suited than traditional instruments of policy change, including class action litigation, to identify options for regulatory reform in Canadian sport. The regulatory reform needs to be bold, responsive, and challenge the *status quo* of organizational autonomy that has allowed maltreatment to become part of the culture of Canadian sport. Options for regulatory reform can be informed by other sectors and jurisdictions and theories of regulatory governance that focus on the relationship between a regulator and regulated entity and the regulator's role in the drafting, monitoring and enforcement of rules. In most cases, options for regulatory reform will require coordinated federal, provincial, and territorial government action and a greater enforcement of rules and standards by a regulator to ensure that sport organizations are held accountable for their role in ensuring safe sport.