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June 2023

## Which Lane Can They Swim In? An Examination of Transgender Athlete Eligibility Policies

By Benjamin Civil, J.D. Candidate 2023 | Queen's University

*This article is a condensed version of the author's paper written in December 2022 for his "Introduction to International Sports Law" class at Queen's University. The full version, with all references, can be found on the SDRCC website.*

*The opinions expressed are those of the author. They do not necessarily correspond to the SDRCC position on any of the issues.*

The issue of how gender is determined for athlete eligibility in competition is a source of significant debate. The 2024 Olympic hopeful Lia Thomas's case to compete has been a springboard for a debate that has existed for decades. The most often-cited reason from those who do not support allowing transgender athletes to compete in their chosen gender category, in women's sports especially, is that it threatens the integrity of the sport<sup>1</sup>. The debate then hinges on how one believes fairness should be defined in sport. Is true fairness unequivocal inclusion or ensuring an equal competitive opportunity?

To further explore the issues surrounding transgender athlete eligibility, the current landscape of attitudes, policies, and research will be examined in the United States, at the International level, and here in Canada.

### United States and Title IX

The United States are polarized on many issues, and the issue of transgender athlete eligibility in sport is no exception. There's been shifting positions at the Federal level towards more inclusivity over recent years. However, the contrasting positions at the state level present significant confusion on when a transgender athlete is eligible to participate, if at all.

### Title IX

Title IX states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance"<sup>2</sup>. The Federal Department of Education was quick to piggyback off the Supreme Court of the United States ruling in *Bostock v Clayton County* by issuing a new interpretation for Title IX in 2021<sup>3</sup>. The 2021 interpretation clarifies Title IX prohibits discrimination based on sexual orientation and gender identity. In essence, individuals cannot be excluded, denied equal access, or otherwise be treated differently because of their sexual orientation or gender identity. However, there remains significant disagreement over how Title IX should apply to transgender athletes, especially with state-enacted laws that ban transgender women and girls from playing on female sport teams<sup>4</sup>.

### International Level

The International Olympic Committee ("IOC") released a framework in 2021 for fairness and inclusion on the basis of gender identity and sex variations<sup>5</sup>. The IOC aims for the framework to be taken into consideration by International Federations and other sport organizations when establishing eligibility rules. Thus, the IOC has delegated the responsibility of eligibility rules to each international sports body as opposed to coming up with one binding rule.

World Aquatics, the international body responsible for administering international competition in water sports, released an updated policy in 2021 for transgender athlete eligibility which presents one of the strictest rules seen

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against transgender participation in international sports. In essence, the policy prohibits transgender women from competing in women's events unless they began medical treatment to suppress the production of testosterone before going through an early stage of puberty, or by age 12, whichever occurred later<sup>6</sup>. World Aquatics is requiring future transgender athletes to transition at an early age and at a time when, in many countries, it's increasingly criminalized or logistically impossible to do so<sup>7</sup>.

Many have questioned if the policy is truly in step with the IOC framework on fairness and inclusion. It's important to keep in mind that before the updated World Aquatics policy, there have not been any transgender women competing in swimming at the international level.

### Canadian Sport

Canada has a plethora of provincial and national sport organizations that oversee competitive and grassroots sport. While it is their responsibility to develop their own transgender athlete eligibility policies, the Canadian Centre for Ethics in Sport ("CCES") sought to guide how these policies are drafted by releasing an instrumental document titled "Creating Inclusive Environments for Trans Participants in Canadian Sport"<sup>8</sup>.

For developmental and recreational sport, the CCES policy guidance suggests that individuals should be able to participate in the gender with which they identify and not be subject to requirements beyond those required of cisgender athletes<sup>9</sup>. For high-performance sport, the policy guidance advises that hormonal therapy should not be required for an individual to participate unless the sport organization can prove that hormone therapy is a reasonable and bona fide requirement<sup>10</sup>.

*"There's an unfounded fear for many sport organizations that trans women are going to rise to the top of the podium en masse."*

### Reframing the Issue

Joanna Harper, a medical physicist, suggests that instead of looking at the rare instances of transgender women athletes having success and calling it unfair, we should look to see if transgender women are overrepresented in women's sports<sup>11</sup>.

Transgender women are evidently, severely underrepresented in the world of women's sports. There's an unfounded fear for many sport organizations that trans women are going to rise to the top of the podium en masse.

"Transphobia is based in a fundamental lack of understanding, which is explained away conveniently by offering elaborate hypotheticals that have little basis in reality"<sup>12</sup>. This interpretation of transphobia perfectly encapsulates the most oft-cited rationale for why trans women shouldn't be allowed to compete against cisgender women. The argument that trans women are presenting a serious threat to the fairness and integrity of women's sport is not supported by the significant underrepresentation of trans women

athletes in women's sport. Policies such as World Aquatics' are in response to no current or former international level trans women swimmers. It is a response to a purely hypothetical problem that doesn't exist. Exclusionary policies like World Aquatics' which are propped up as maintaining fairness in women's sport are attempts to regulate away discomfort in a way that feels logical<sup>13</sup>.

Not only has Lia Thomas achieved great athletic success, she also helped start a conversation that needed to be had. More refined research and collective human rights advocacy will keep the conversation alive and continue the push for eligibility policies that are inclusive and responsive to the athletic realities of transgender athletes, not based on elaborate hypotheticals. ■

### Footnotes

- [1] Canadian Centre for Ethics in Sport, "Creating Inclusive Environments for Trans Participants in Canadian Sport", (2018) [CCES].
- [2] *Title IX, Education Amendments of 1972*, 20 U.S.C.
- [3] *Bostock v Clayton County*, 590 U.S. \_\_\_(2020).
- [4] Jo Yurbaba, "Louisiana becomes 18<sup>th</sup> state to enact a transgender athlete ban".
- [5] International Olympic Committee, "IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations".
- [6] Matthew Futterman, "Swimming Body Bars Most Transgender Women".

- [7] Laura McQuillan, "Transgender women athletes' future in competition uncertain as sports organizations change rules, issue bans".
- [8] CCES, *supra* note 1.
- [9] *Ibid.*
- [10] *Ibid.*
- [11] Lisa Deaderick, "Banning transgender women from competing in women's sports is 'unnecessary' and 'restrictive'".
- [12] *Ibid.*
- [13] Ling, Sophia. "Lia Thomas started a conversation about transgender rights. It's time we dive into it".

To read the full version of this article, with references:

[http://www.crdsc-sdrcc.ca/eng/documents/BenCivil\\_WhichLaneCanTheySwimIn\\_LongVersion.pdf](http://www.crdsc-sdrcc.ca/eng/documents/BenCivil_WhichLaneCanTheySwimIn_LongVersion.pdf)



## SDRCC Roster Member Profile: Learning More About our Arbitrators and Mediators

They come from every region of Canada and have extensive experience in alternate dispute resolution and sports-related issues, but how much do we really know about them? The SDRCC has an impressive list of 54 mediators and arbitrators and we will slowly be introducing you to some of them through our regular installments of “SDRCC Roster Member Profiles”. In this edition we would like to present, **Harveen Thauli, Arbitrator from Vancouver, in British Columbia.**



### What led you to a career in ADR?

My career in ADR began when I was elected, as the first Canadian, to the *Fédération Équestre Internationale* (FEI) Tribunal in 2017. As I began presiding over hearings and writing decisions, I realized how much I enjoyed analyzing difficult legal issues and reducing complicated arguments

into plain English. I have written decisions on politically charged issues such as disqualifying a rider from the Tokyo 2020 Olympics, upholding the ban on Russian/Belarusian athletes from competing in FEI events, and levying a heavy sanction against a rider for a serious horse abuse.

This experience led me to pursue my Chartered Arbitrator designation. Since then, I have been appointed to the International Tribunal of Sport Resolutions (UK) and selected for the Ordinary and Doping Tribunals of the SDRCC. More recently, I have been appointed to the Horseracing Integrity and Welfare Unit in the United States.

### Specialization / Area of Expertise:

My practice areas are administrative law, professional conduct, corporate/securities law and securities litigation. After almost 27 years of experience in private practice and regulatory environments, my focus is becoming more dedicated to arbitration.

### As an Arbitrator with the SDRCC, I...

...am committed to serving our Canadian sport community

with fairness and integrity. When a matter reaches arbitration, the relationship between parties has often become acrimonious. Although I strive to be respectful and professional, there are times when I must be firm and direct with parties so that a proceeding continues to move forward smoothly. I also endeavour to write my decisions in plain English, because I believe it is important that parties fully understand the rationale for my decision and any poignant comments I make about their credibility or conduct.

### Favourite Sport(s):

My favourite sport is horse riding, especially jumping over fences! I also enjoy weight training and more recently, I have taken up pickleball.

### Dispute Prevention Tip for Athletes:

The best advice I can give to any athlete is to be professional and respectful of fellow athletes and coaches. What may seem as innocent jokes or gestures could lead to disciplinary proceedings with serious consequences such as losing sponsors or suspensions. Since one athlete may perceive a situation differently from another, it is important, in my view, for athletes to consider the intention behind their words or actions and their impact on another person. This will inevitably lead to promoting a supportive, inclusive and safe sport environment. ■

In our next edition, look for the profile of an SDRCC Med/Arb.

**Follow Us on Social Media:** Stay current on the Sport Dispute Resolution Centre of Canada’s new decisions, activities and educational publications ! Keep up with initiatives and updates from the Abuse-Free Sport program and the Office of the Sport Integrity Commissioner !

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June 20, 2023 will mark the first anniversary of the Abuse-Free Sport program!



## New SDRCC Staff Members



**Parth Mehta** joins the OSIC as Administrative Assistant. After practicing as a lawyer at the Bombay High Court, he is currently pursuing an LLM in Business & IP Law at Osgoode Hall Law School, Toronto. Having been a former amateur boxer, he is passionate about sport and hopes to better understand the Canadian sports system. He brings with him international sports law experience. Additionally, he has taken part in sports law moot court competitions such as Osgoode's Hockey Arbitration Competition, 2023 where his team placed third.



**Thomas Ibrahim** joins the OSIC as Registry and Database Administrator. He completed his undergraduate degree in Statistics with a minor in Economics at the University of Waterloo. With a passion for sports, this position will allow him to combine his technical skills with his passion. Thomas is excited to do his part to help athletes across Canada practice sport safely.



**Leslie-Anne Wood** joins the OSIC as Senior Manager, Investigations and Assessments. She is a lawyer and has worked in both the public and private sectors, including as clerk and legal counsel at the Supreme Court of Canada, and as a litigator at IMK LLP. In addition to her Canadian legal training, she holds a B.Sc. in Environmental Science from the University of Ottawa and an LL.M. in American and Comparative Law from Yale Law School. Leslie-Anne loves being in nature, and enjoys yoga, meditation, dance and weight training.



**Jennifer Monk** joins the SDRCC as Senior Manager, Communications. She is a former artistic swimming athlete and coach. After coaching the junior national team in New Zealand, she returned to Montreal to build her career in communications. Jennifer brings a wealth of experience in brand identity, marketing and communications strategies. She looks forward to giving back to Canadian sport and making a positive, lasting change with the Abuse-Free Sport program.



**Virginie Maloney** joins the OSIC as Deputy Director, Investigations and Assessments. She is a lawyer who specializes in harassment and violence in the workplace, and has previously held a position where she was in charge of legal services to help victims of violence in the workplace for all of Quebec. She teaches occupational health and safety law and is passionate about defending vulnerable people. She wants to have an impact on people's lives to make the sport environments safer. ■

### Notable Dates:

- **June 13, 2023:** Kiosk at the U SPORTS Conference & Annual Meeting, Montebello, QC;
- **June 23-25, 2023:** Kiosk at the OUA Diversity in Sports Conference, Toronto, ON;
- **July 12, 2023:** Abuse-Free Sport Webinar Series 2023 - What is the role of sport leaders in fostering safe sport environments? (open to the public);
- **August 16, 2023:** Abuse-Free Sport Webinar Series 2023 - How to apply an intersectional lens to create safe sport environments? (open to the public);
- **August 29 & September 5, 2023:** Virtual presentations to coaches of CSI-Calgary - Advanced Coaching Diploma;
- **September 18-20, 2023:** SDRCC presentation at Safe Sport International Conference, London, UK;
- **September 27, 2023:** Abuse-Free Sport Webinar Series 2023 - Best practices for communicating safe sport policies to stakeholders (open to the public). ■



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ISSN 1712-9923

Funded by the  
Government  
of Canada

