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## The Unnecessary Use of Gender Verification in Sport

by Diane Wu, J.D. Candidate 2019 | Queen's University

*This article is a light-weight version of the author's paper written in March 2019 for her "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.*

### **Early Days of Gender Testing in Sport**

Gender testing dates back to as early as 1900, the year women were finally permitted to participate in the Olympics and included various combinations of "nude parades" in front of doctors, evaluations of genitalia and hair patterns, and buccal smear tests. After severe criticism, the International Olympic Committee (IOC) abandoned mandatory sex testing of female athletes during the 2000 Olympic Games in Sydney. Similarly, the International Association of Athletics Federations (IAAF) did not require compulsory gender testing, but instead, athletes and teams could bring "gender issues" to the attention of authorities.

### **The Legal Challenges**

The IAAF received substantial backlash with their handling of Caster Semenya's case following the 2009 World Championships, prompting a re-evaluation of its policies surrounding gender verification. In May 2011, the IAAF released the *Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition* (the "**2011 Hyperandrogenism Regulations**"). These new regulations aimed to create a framework for responding to situations wherein an athlete's gender was questioned, focusing on women with hyperandrogenism - a medical condition resulting in naturally elevated androgen levels. Under these new policies, females already diagnosed with hyperandrogenism were required to notify the IAAF. Further, the IAAF Medical Manager was also permitted to investigate a female athlete if he had "reasonable grounds" to believe that an athlete had

hyperandrogenism. A female athlete under question was only allowed to return to competition if she had testosterone levels below the normal male range (less than 10nmol/L) or if she had an androgen resistance that resulted in her gaining no competitive advantage from having elevated androgen levels. Lowering testosterone levels would require either taking anti-androgen drugs or undergoing surgical intervention.

In 2015, the Court of Arbitration for Sport (CAS) suspended the *2011 Hyperandrogenism Regulations* for two years after a legal challenge was brought by Indian sprinter Dutee Chand, who was subjected to examinations when concerns were raised about her eligibility to compete as a female. The CAS ruled that the IAAF failed to establish that the *2011 Hyperandrogenism Regulations* were necessary for maintaining fairness in female athletics. Further, the CAS ruled that there was lack of scientific evidence supporting the claim that female athletes with hyperandrogenism derived a significant performance advantage. The IAAF was given a two-year window to present further evidence to support their claims.

Rather than provide new evidence, the IAAF replaced the 2011 regulations with its new *2018 Eligibility Regulations*. Abandoning the term "hyperandrogenism", these new regulations are instead directed at any female athlete who has a "difference of sexual development" ("**DSD**") resulting in testosterone levels greater than 5nmol/L, a lower threshold than the 10nmol/L in the *2011 Hyperandrogenism Regulations*. While the *2011 Hyperandrogenism Regulations* applied to all athletics events, the new rules only apply to "middle distance" track events where the IAAF claims that performance enhancing benefits of elevated testosterone are most prominently found, including the 400m, hurdles, 800m, 1500m, one mile, and combined events.

If a female athlete wishes to compete, she must be recognized at law as either female or intersex, reduce her testosterone level below 5nmol/L for a period of six months, and maintain her testosterone level below *(continued on page 2)*

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## The Unnecessary Use of Gender Verification in Sport *(continued)*

5nmol/L for as long as she wishes to compete. If a female athlete does not wish to lower her testosterone, she has three options: (1) compete in the restricted events, but not at an international level, (2) compete in the male classification, (3) compete in the intersex classification, if available.

The *2018 Eligibility Regulations* have not yet come into effect because of a legal challenge brought by Caster Semenya in June 2018. Semenya and her lawyers argue that the regulations are irrational, unjustifiable, and violate the IAAF Constitution, the Olympic Charter, the laws of Monaco, and universally recognized human rights.

### **The Main Weaknesses of the IAAF Arguments**

#### **A. Elevated testosterone does not provide female athletes with an advantage**

The *2011 Hyperandrogenism Regulations* and the *2018 Eligibility Regulations* are both premised on the notion that higher than “normal” testosterone levels give female athletes significant performance advantages. Drawing on studies that demonstrate an ergogenic advantage greater than 9% for athletes with testosterone levels in the male range as compared to those in the “normal” female range, the IAAF claims that female athletes with testosterone levels greater than 5nmol/L should lower their testosterone levels to be in the “normal” female range.

While higher levels of testosterone can help individuals increase their muscle mass and strength and increase oxygen transfer and uptake, there is no evidence to show that athletes with higher levels of endogenous testosterone perform significantly better than those with lower levels. The claim that elevated levels of natural testosterone give female athletes an advantage is further undermined by the fact that the majority of studies on the correlation between testosterone and athletics have been conducted on men. A study conducted by MacLean et al. found that elevated androgen levels impact women differently than men and that androgens were not required for peak muscle mass in females. The impact of androgens on a person’s body varies significantly from person to person and using testosterone as a measure of athletic ability is meaningless.

Beyond the IAAF’s erroneous conclusions derived from these studies, the data itself has also been deemed by experts to be riddled with accounting errors and susceptible to possible bias as they were conducted by IAAF’s own in-house researchers. For example, these studies used “phantom times” that were not in original IAAF competition results, along with results from athletes that have now been disqualified for doping, thereby skewing the results. Clearly, there is lack of evidence to support the notion that naturally elevated levels of testosterone confer a significant advantage on female athletes. In short, the IAAF oversimplifies the complex functioning of the human body to justify its regulations.

#### **B. Sport is not a level playing field**

In addition, the *2018 Eligibility Regulations* use “fairness” and

the need to create a “level playing field” as a justification for placing restrictions on female athletes with DSDs. The IAAF claims that this fairness starts at the division between male and female athletes because of the significant advantages that men have in size, strength, and power. However, critics believe that creating a level playing field amongst elite athletes is a “futile endeavour”

Many elite athletes have biological advantages, and yet evade policing by sports organizers. Many swimmers have a longer than average wingspan, and runners and cyclists have genetic variations that give them superior aerobic capacity and resistance to fatigue, but sports organizers fail to test athletes for these performance-enhancing biological variations. The IAAF justifies their differential treatment of female athletes with DSDs by drawing on the scientifically flawed argument that no other biological trait gives female athletes as large of a performance advantage.

**“Many elite athletes have biological advantages, and yet evade policing by sports organizers.”**

While elevating testosterone levels by injecting hormones to gain a competitive advantage would certainly offend the ideas of “fairness”, women with DSDs have not undertaken practices to obtain any such advantage. The IAAF’s attempt to create a level playing field is incongruous with the reality of competitive sports and does not justify the harm imposed on female athletes who are born with a rare

but natural condition.

#### **The detrimental effect on female athletes**

The IAAF’s current gender verification framework produces three types of harm: psychological, physiological and financial. The psychological harm stems from the fact that singling out a female athlete for a gender test may reveal information to the woman about her body that she was previously unaware of. Having her gender identity questioned can be a humiliating and possibly psychologically harmful experience for the athlete.

On the surface, the *2018 Eligibility Regulations* seemingly avoid perpetrating physiological harm by stating that no athlete will be forced to undergo surgery or anatomical changes, such as a gonadectomy, to reduce testosterone levels. However, hormonal interventions used to lower testosterone levels can have dangerous side effects on the human body. Anti-androgens have side effects such as the disruption of carbohydrate metabolism, diuretic effects that cause excessive thirst, urination and electrolyte imbalances, headaches, and fatigue - all of which would be extremely detrimental to an elite female athlete.

Finally, the *2018 Eligibility Regulations* also impose a heavy financial burden on female athletes with DSDs. While the IAAF will pay the costs of an initial assessment and diagnosis of the athlete, the athlete herself must pay the costs of her personal physician and any treatment that the physician prescribes. Therefore, the *2018 Eligibility Regulations* impose unnecessary psychological, physical and financial harms on female athletes with DSDs.

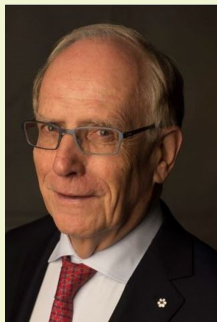
*(continued on page 3)*



## 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 50 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 **Richard H. McLaren, Arbitrator from London, Ontario.**

### What Led You To a Career in ADR?



I taught university courses in ADR and co-authored a book called “Innovative Dispute Resolution - The Alternative”.

I began my career doing labour arbitrations, but sport is my passion. I recognized the need for an independent, free-standing ADR system for amateur sport in Canada where fair and sound decisions could be made by trained decision-makers. I acted as the Co-Chief Arbitrator for ADRsportRED (now known as SDRCC) from 2002 to

2006, which contributed to the implementation of a simple, informal process where you work with the parties toward an agreement and where there is fair representation for all (regardless of gender or culture).

### Specialization/Area of Expertise:

I am a firm believer that sport is built on integrity and strength of character. I wanted to contribute to that integrity and have worked assiduously to further that cause. I specialize in anti-doping and anti-corruption. As such, I

was appointed the Independent Person to head the Sochi investigation. I had no idea I would find myself at the centre of sports intrigue with ramifications that impacted the Olympics.

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

...have been introduced to multitudes of sporting activities and organizations. I also enhanced my familiarity with anti-doping laws, rules and regulations and I am now a long standing member of the Court of Arbitration for Sport (CAS).

### Favorite Sport(s):

My favorite sports include tennis, basketball, football and sailing.

### Dispute Prevention Tip for Athletes and Federations:

Discipline, teamwork, personal commitment, leadership and loyalty to one's teammates and coaches are paramount. Read and re-read until you fully understand Athletes' Agreements, Rules and Codes of Conduct. ■

**In our next edition, look for the profile of another SDRCC Roster Member.**

*(continued from page 2)*

### **Gender-based discrimination**

If the IAAF and other sports organizations wish to continue questioning the gender of female athletes, the same policies should apply to male athletes as well. Arguing that gender testing should be implemented to preserve “fairness” in sport and then only applying these policies to female athletes is in itself unfair and discriminatory. Sports organizers have never considered what genetic advantages might make a male athlete superior to his competitors and give him an “unfair advantage.” Biological advantages should be treated equally in both men and women's athletics. Elite male athletes continue to enjoy competing in sport without being subject to scrutiny about their gender and it is time that sports organizers treat elite female athletes the same.

### **Conclusion**

For over fifty years, female athletes have been subject to gender testing while their male counterparts remain unscathed.

Elite female athletes such as Semenya and Chand should not be forced to undergo unnecessary medical intervention and humiliation in order to fit into the IAAF's mould of a “normal” woman. The IAAF's justifications for the *2018 Eligibility Regulations* rest on faulty logic and poor science, as their attempt to create a level playing field simply cannot be realized in elite sport. Finally, the *2018 Eligibility Regulations* subject women to severe psychological, physical, and financial harms.

To ensure that women in athletics no longer must endure invasive and demeaning experiences, women with DSDs and all athletes with other naturally occurring differences should not be forced to undergo extraneous and potentially harmful medical interventions to have the right to compete. It is time that the media, the public, and sport officials rise to rectify this situation. ■

*To read the full version of this article:*

[http://www.crdsc-sdrcc.ca/eng/documents/The\\_Unnecessary\\_Use\\_of\\_Gender\\_Verification\\_in\\_Sport\\_EN\\_full\\_version.pdf](http://www.crdsc-sdrcc.ca/eng/documents/The_Unnecessary_Use_of_Gender_Verification_in_Sport_EN_full_version.pdf)





## Exiting Board Members

In July 2019, six Directors will complete their last mandate on the SDRCC Board. **David de Vlieger, Jean R. Dupré, Marg McGregor, Andréanne Morin, Dasha Peregoudova and Anthony Wright** dedicated the last few years to their shared passion for sport and alternative dispute resolution in Canada. They all, each in their own way, greatly contributed to the success of our organization during their term, and their legacy will be felt for a long time. A special thanks to David de Vlieger who acted as Chair of the Board for four years. ■

THANK YOU SO MUCH FOR YOUR CONTRIBUTION!



## New SDRCC Staff Member



**Kathiana Desir** joined the SDRCC on May 21 as Administrative Assistant. She is responsible for the coordination of corporate affairs and technology and for assisting with the general administration of the SDRCC office. Kathiana is currently studying construction business management. She enjoys drawing and her favorite sport is basketball. ■



## SAVE THE DATE!

The SDRCC is proud to partner once again with the Court of Arbitration for Sport (CAS) to hold a CAS Regional Seminar in Canada, in conjunction with its next public conference. **The event will be held in Montreal, Quebec, on Thursday January 30, 2020, at the Bonaventure Hotel.**

Check the SDRCC website for more information to come. ■

## Notable Dates

- **June 4:** Workshop and SDRCC Kiosk at U Sports Annual General Meeting (Markham, ON);
- **June 8:** Presentation on Safe Sport at Hockey BC Annual General Meeting (Sun Peaks, BC);
- **June 11:** Presentation at ADR Institute of BC Annual Conference (Vancouver, BC). ■

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## Thank you Liane!

After close to eight years of loyal service, **Liane Mendelsohn** left her Administrative Assistant position last April.

We thank her for her dedication, contribution and passion over the years and wish her the very best in her future pursuits! ■



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