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Need to Align the Modern Games with the Modern Times: The International Olympic Committee's Commitment to Fairness, Equality, and Sex Discrimination

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NOTES

A NEED TO ALIGN THE MODERN GAMES WITH THE MODERN TIMES: THE INTERNATIONAL OLYMPIC COMMITTEE'S COMMITMENT TO FAIRNESS, EQUALITY, AND SEX DISCRIMINATION

INTRODUCTION

Imagine spending your life training in a sport. Decades of hard work and dedication, as well as some natural talent, have made you one of, if not the, best in the world. You train alongside the best athletes in your sport, continuously pushing each other to the limits of performance. This season, though, all of your training partners have been given an opportunity that you have not. You watch as they pack their gear to head to the pinnacle of sporting competition, the Olympic Games. While they dream of receiving an Olympic medal, as well as television coverage and endorsement money, you must stay back and watch the events on television in your home country. Now realize that your exclusion from the Games has nothing to do with qualifications, performance, injury, or illness. Instead, you are excluded from the Olympic Games simply because you are a woman.

This was the story of American ski jumper Lindsey Van.¹ Van, age twenty-five at the time of the 2010 Winter Olympic Games,² began

¹ See Beau Dure, *Women's Ski Jumpers Wish They Were Olympians, Not Spectators*, USA TODAY, Feb. 19, 2010, http://www.usatoday.com/sports/olympics/vancouver/nordic/2010-02-19-womens-ski-jumping_N.htm (describing women ski jumpers as "spectators and advocates determined not to let another Olympic cycle go by without their inclusion" despite the International Olympic Committee's decision to exclude their sport from the 2010 Games); Vanessa Pierce, *Olympic Time—Not for Me but for My Friends!*, LINDSEY VAN, <http://lindseyvan.com/2010/02/12/olympic-time%E2%80%94not-for-me-but-for-my-friends/> (Feb. 12, 2010, 8:42 PM) ("I'm sad I can't be there, but I will be watching to support my friends.").

² See *Lindsey Van*, WOMEN'S SKI JUMPING USA, http://www.wsjusa.com/athletes_van (last visited Mar. 6, 2011) [hereinafter *Lindsey Van*] (describing Lindsey Van's biography and career highlights).

her training in ski jumping at the age of seven, and rigorously trained for eighteen years in hopes of an Olympic berth.³ Van won the 2009 women's world championship⁴ and held the hill record, over both men and women, in the ninety-meter jump at the Vancouver, British Columbia facility leading up to the 2010 Winter Olympic Games.⁵ Despite their undeniable talent and the fact men's ski jumping remained an Olympic event, the International Olympic Committee ("IOC") made an executive decision that Van, and all other elite women ski jumpers, would not be allowed to compete in the 2010 Vancouver Winter Games.⁶

Subsequently, Van and fourteen other highly ranked women ski jumpers sued the Vancouver Olympic Committee ("VANOC"); yet, ultimately, the Supreme Court of British Columbia, the Court of Appeal for British Columbia, and the Supreme Court of Canada determined the Canadian courts were powerless to mandate female ski jumping at the 2010 Olympic Games.⁷

Largely due to historical remnants of gender discrimination within the Olympic Movement,⁸ ski jumping as a Winter Olympic event was

³ Howard Berkes, *Gender Barrier Persists at Vancouver Olympics*, NPR (Dec. 29, 2008), <http://www.npr.org/templates/story/story.php?storyId=98593877>. Van has won a total of 15 U.S. national jumping titles. *Lindsey Van*, *supra* note 2.

⁴ See *Lindsey Van*, *supra* note 2; see also Associated Press, *Van Wins Women's Ski Jump Title*, ESPN (Feb. 20, 2009, 12:59 PM), <http://sports.espn.go.com/oly/skiing/news/story?id=3920762> (describing Van's world title victory after recovering from a knee injury she had suffered the previous season).

⁵ See, e.g., Howard Berkes, *Women Lose Bid to Ski Jump at Olympics*, NPR (July 10, 2009), <http://www.npr.org/templates/story/story.php?storyId=106486162> (describing Van's record distance jump on the K95 "normal hill"); Christa Case Bryant, *Why Women Can't Ski Jump in the Winter Olympics*, CHRISTIAN SCI. MONITOR, Nov. 8, 2009, available at <http://www.csmonitor.com/2009/1109/p17s03-ussc.html> (discussing the accomplishments and frustrations of Van and the other ski jumpers involved in the litigation leading up to their appeal to the British Columbia Court of Appeals).

⁶ See Berkes, *supra* note 5 (discussing the IOC decisions' rationale and resulting litigation over the exclusion of women's ski jumping from the 2010 Winter Olympics).

⁷ *Sagen v. Vancouver Org. Comm. for the 2010 Olympic and Paralympic Winter Games (Sagen I)* (2009), 98 B.C.L.R. 4th 109, para. 7 (Can. B.C.); *Sagen v. Vancouver Org. Comm. for the 2010 Olympic and Paralympic Winter Games (Sagen II)* (2009), 98 B.C.L.R. 4th 141, para. 6 (Can. B.C.); *Sagen v. Vancouver Org. Comm. for the 2010 Olympic and Paralympic Winter Games (Sagen III)*, [2009] 3 S.C.R. ix (Can.), 2009 S.C.R. LEXIS 126.

⁸ See, e.g., *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 681 (9th Cir. 1984) (Pregerson, J., dissenting) (discussing the IOC's history of discriminating against women in the Modern Olympic Games); JOHN A. LUCAS, *FUTURE OF THE OLYMPIC GAMES* 134 (1992) (describing the founder of the Modern Olympics, Baron Pierre de Coubertin, as unwilling to promote the inclusion of women in the Games); Susannah Carr, *Title IX: An Opportunity to Level the Olympic Playing Field*, 19 SETON HALL J. SPORTS & ENT. L. 149, 150 (2009) (noting the opinion of Pierre de Coubertin, the founder of the modern Olympic Games, that the Olympics were not a proper place for women); Chantalle Forgues, Note, *A Global Hurdle: The Implementation of an International Nondiscrimination Norm Protecting Women from Gender Discrimination in International Sports*, 18 B.U. INT'L L.J. 247, 249-51 (2000) (describing the legacy of gender discrimination in the Olympics from ancient to modern times).

closed to women until April 2011.⁹ As women ski jumpers were not able to successfully litigate their way into the 2010 Olympic Games,¹⁰ this Note analyzes whether litigation will ever be a feasible mechanism for athletes to protest and change the IOC's policies. This Note recognizes that over the past 100 years, the IOC's motives, incentives, and commitments have frequently contradicted the fundamental principles of the Modern Olympic Movement,¹¹ set out in the Olympic Charter.¹² Resultantly, the negative publicity that results from extensive athletic litigation ultimately weakens the Olympic Movement that inspires athletes in the first place.¹³

As national courts have been unwilling to rule against the IOC, this Note suggests the key to preserving the legitimacy of the Modern Games is not through litigation, but through an internal restructuring of the IOC so that the Olympic Movement's fundamental values of fairness and equality always prevail.

⁹ See Berkes, *supra* note 5 (citing the frustration of Anita DeFrantz, a former Olympian and veteran IOC member from the United States, who questions why this last step toward gender equality remains so hard for the IOC to take). *But see* Korva Coleman, *IOC Adds Women's Ski Jump to 2014 Winter Games*, NPR (Apr. 6, 2011, 10:54 AM), <http://www.npr.org/blogs/thetwo-way/2011/04/06/135175144/ioc-adds-womens-ski-jump-to-2014-winter-games> (discussing the IOC's vote to admit women's ski jumping, along with five other new events, to the 2014 Olympic Games).

¹⁰ See *Supreme Court Spurns Women Ski Jumpers*, CBC (Dec. 22, 2009, 11:23 AM), <http://www.cbc.ca/olympics/skijumping/story/2009/12/22/bc-oly-women-scoc.html> (discussing the Supreme Court of Canada's announcement that it would not hear the ski jumpers' appeal from the Court of Appeals for British Columbia).

¹¹ See, e.g., Christine Brennan, *Just Like Drug Issue, Judging Controversies Need Major IOC Intervention*, USA TODAY (Aug. 25, 2004, 2:45 PM), http://www.usatoday.com/sports/columnist/brennan/2004-08-25-brennan-judging_x.htm (criticizing the IOC's "quiet" approach to the judging controversies in the gymnastics events at the 2004 Athens Olympics); Tom Fordyce, *The Track Record on Olympic Corruption*, BBC SPORT (July 30, 2004), http://news.bbc.co.uk/sport2/hi/other_sports/olympics_2012/3939219.stm (discussing bribery of IOC officials in exchange for host city selection votes).

¹² INT'L OLYMPIC COMM., OLYMPIC CHARTER 11 (2010), available at http://www.olympic.org/Documents/olympic_charter_en.pdf [hereinafter OLYMPIC CHARTER] (listing the six fundamental principles of Olympism, including that "[t]he practice of sport is a human right" and that "understanding with a spirit of friendship, solidarity and fair play" are necessary for the Olympic spirit). The Olympic Charter codifies the fundamental principles, rules, and bylaws adopted by the IOC. It was first published in 1908 and is updated periodically. See *The Olympic Charter Through Time*, INT'L OLYMPIC COMM., <http://www.olympic.org/content/olympism-in-action/specialized-sections/olympic-charters/?tab=0> (last visited Mar. 6, 2011) (providing background information about the history of the Olympic Charter as well as the text of the different historical versions of the Charter).

¹³ See, e.g., C. Christine Ansley, Comment, *International Athletic Dispute Resolution: Tarnishing the Olympic Dream*, 12 ARIZ. J. INT'L & COMP. L. 277, 301-02 (1995) (arguing that the inability of athletes to obtain legal protection erodes the principle of fairness at the foundation of the Olympic Games); *cf.* Carr, *supra* note 8, at 179 (concluding that the Olympic Movement will be stronger if there is "a more diverse and fair [legal] playing field").

I. WOMEN AND THE MODERN OLYMPIC MOVEMENT

The global acceptance of women in sports has changed dramatically over the past century.¹⁴ When Baron Pierre de Coubertin founded the Modern Olympic Games in 1896,¹⁵ and while he led the IOC for twenty-nine years, de Coubertin did not promote or encourage “ladies’ events.”¹⁶ De Coubertin described the Olympics as “the solemn and periodic exaltation of male athleticism with internationalism as a base, loyalty as a means, art for its setting, and female applause as reward.”¹⁷ The IOC leadership maintained this mentality against women in sports, and limited women’s participation in the Olympic Games for over fifty years.¹⁸

A. *Evolving Ideals on Women in Sports*

Since the second half of the twentieth century, the number of women athletes and women’s sports has dramatically increased.¹⁹ As a result, many now view sports participation as a right that belongs equally to both women and men.²⁰ Furthermore, the IOC and many independent nations promote equal sports participation between the sexes.²¹ The most prominent example of this in the United States was the implementation of Title IX.²² Congress enacted Title IX in 1972

¹⁴ See LUCAS, *supra* note 8, at 134–36 (1992) (describing the IOC’s recognition of the imbalance of women’s participation as a problem); JAMES A.R. NAFZIGER, INTERNATIONAL SPORTS LAW 125 (2d ed. 2004) (discussing issues of gender discrimination in sports and international attempts to resolve them); see also Carr, *supra* note 8, at 150–51 (describing the evolution of the notion that women’s participation in sports is important); Forgues, *supra* note 8, at 249–51 (recognizing that the IOC has made some efforts to incorporate women into the Olympics, but arguing that it is still far from treating male and female athletes equally).

¹⁵ See LUCAS, *supra* note 8, at 120 (discussing the first Olympic Games, which Baron Pierre de Coubertin founded in 1896).

¹⁶ *Id.* at 134 (stating that de Coubertin was unable to encourage the participation of women in sports due to his “Victorian-Edwardian” beliefs).

¹⁷ *Martin v. Int’l Olympic Comm.*, 740 F.2d 670, 681 (9th Cir. 1984) (Pregerson, J., dissenting); NAFZIGER, *supra* note 14, at 124, n.8.

¹⁸ See *Martin*, 740 F.2d at 681 (Pregerson, J., dissenting) (mentioning the IOC’s vote to restrict women’s participation in the Olympics to sports “particularly appropriate to the female sex”); Forgues, *supra* note 8, at 249–50 (same).

¹⁹ See, e.g., Carr, *supra* note 8, at 150 (describing the steady increase in percentage of female competitors in the Olympics through 2004); see also Forgues, *supra* note 8, at 250–52 (noting that although strides have been made in women’s struggle for equality in the Olympics, discrimination is still prevalent).

²⁰ See, e.g., NAFZIGER, *supra* note 14, at 127 (describing the 1979 Convention on the Elimination of Discrimination Against Women). *But see* Carr, *supra* note 8, at 154 (discussing the limited impact of the instrument signed by a great number of countries at the 1979 Convention).

²¹ See Carr, *supra* note 8, at 154–55 (describing the actions taken by several countries and the IOC to rectify disproportionate gender participation in sports); see also LUCAS, *supra* note 8, at 134–36 (promoting not only gender equality, but also equal participation by nation).

²² 20 U.S.C. § 1681(a) (2006) (prohibiting sex discrimination in “any education program

to ensure equal athletic opportunities for both sexes.²³ During the first thirty years of Title IX, female participation opportunities in collegiate athletics grew over 400%, while female participation in high school sports grew 974%.²⁴

The increase in women's athletics in the United States has been echoed in Olympic competition, although the IOC appears to have taken a more gradual approach to women in sports than Congress.²⁵ For example, 1976 was the first year that women comprised more than fifteen percent of all Olympic athletes.²⁶ In the 2004 Summer Olympics, women finally constituted over forty percent of all competing athletes.²⁷

The IOC expressly denounces "[a]ny form of discrimination with regard to . . . gender" in the Olympic Charter's Fundamental Principles of Olympism.²⁸ Yet, despite the IOC's efforts to abolish its discriminatory past, commentators have argued that there is a disconnect between the IOC's conduct and the Olympic Charter.²⁹ According to Chantelle Forgues, the number of women participating in the Olympics and the number of Olympic events open to women still lags significantly behind those of men. This gap ultimately denies women the opportunity not only to receive medals, but also to participate in "certain kinds of events altogether."³⁰ Further, Susannah Carr contends that because the IOC does not use a comprehensive

or activity receiving Federal financial assistance").

²³ Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (1972); see also Carr, *supra* note 8, at 158–59 (explaining the structure of Title IX ensures equal athletic opportunity for women).

²⁴ See Elisa Hatlevig, *Title IX Compliance: Looking Past the Proportionality Prong*, 12 SPORTS LAW. J. 87, 101 (2005) (outlining the success of Title IX and explaining that male participation in high school and collegiate sports has also increased since the passage of Title IX); see also Carr, *supra* note 8, at 163 (discussing the exponential growth of women's participation in sports since the passage of Title IX).

²⁵ See, e.g., Carr, *supra* note 8, at 156 (discussing how the International Sailing Federation chooses boats for Olympic sailing competitions that are designed to benefit male athletes, even though the sailing events are "open" to women); Forgues, *supra* note 8, at 250–52 (arguing that there have been steps toward gender equality in the Olympics, but that the IOC still must continue to overcome remnant sex discrimination).

²⁶ Carr, *supra* note 8, at 150.

²⁷ See Carr, *supra* note 8, at 150 (noting that the percentage of Olympic female athletes in 2004 reached 41 percent).

²⁸ OLYMPIC CHARTER, *supra* note 12, at 11.

²⁹ See, e.g., Carr, *supra* note 8, at 151 (arguing that the IOC's strides towards gender equality "have not produced truly equal opportunities for men and women competing in the Olympic Games"); Forgues, *supra* note 8, at 251 ("Examination of recent and future Olympic competitions reveals that there still is no parity between men and women in the number, kind and quality of events offered to women.").

³⁰ Forgues, *supra* note 8, at 251 (noting that women were excluded from bobsledding and ski jumping in the 1994 and 1998 Winter Olympics, as well as from boxing and wrestling at the 1996 and 2000 Summer Olympics).

Title IX-type measuring system, but instead “only considers the proportion of female competitors, and the proportion of events open to female competitors,” it is failing in its duty to equally treat female athletes.³¹ Consequently, women athletes and their supporters have taken more drastic measures to pursue equality; litigation has been one popular route.³²

*B. Litigation as a Route to Achieve a Place
on the Olympic Programme*

As women’s participation in sports has increased, litigation surrounding sporting opportunities and particularly participation in the Olympic Games, has also dramatically increased.³³ Since there is no independent, international sports body dedicated to dispute resolution,³⁴ disgruntled athletes must either arbitrate their claims through an arbitration board established and financed by the IOC—the Court of Arbitration of Sport (“CAS”)³⁵—or pursue their claims in national courts, which have shown a general deference toward Olympic rule.³⁶ Largely due to the increased commercialization of the

³¹ Carr, *supra* note 8, at 151 (arguing that the Olympics should adopt a Title IX-type system, since it provides a “comprehensive method for measuring and enforcing gender equality”).

³² See, e.g., *Martin v. Int’l Olympic Comm.*, 740 F.2d 670, 681 (9th Cir. 1984); *Sagen II* (2009), 98 B.C.L.R. 4th 141 (Can. B.C. C.A.); *Sagen I* (2009), 98 B.C.L.R. 4th 109 (Can. B.C. Sup. Ct.).

³³ See *supra* note 24 and accompanying text; see also Ansley, *supra* note 13, at 300 (stating that the economic incentives for athletes have also contributed to an increase in litigation “to protect their right to compete”); Marcia B. Nelson, Note, *Stuck Between Interlocking Rings: Efforts to Resolve the Conflicting Demands Placed on Olympic National Governing Bodies*, 26 VAND. J. TRANSNAT’L L. 895, 907 (1993) (discussing athletes’ use of litigation to maintain control over the financial aspect of their careers and their ability to compete).

³⁴ See NAFZIGER, *supra* note 14, at 65 (noting that athletes have become more litigious in the past few decades, particularly in Europe, and no international body exists to resolve many of the conflicts); Ansley, *supra* note 13, at 278 (“[A]n organized and independent body must be delegated the authority to resolve athletic conflicts . . .”); Nelson, *supra* note 33, at 898 (“Amateur athletes currently lack an international, organized, and authoritative body that will resolve their disputes effectively and that will allow them appropriate avenues for appeal.”).

³⁵ See NAFZIGER, *supra* note 14, at 40–45 (describing the structure of the CAS and cases it has arbitrated); Ansley, *supra* note 13, at 297–99 (discussing the failings of the CAS); David J. Ettinger, Comment, *The Legal Status of the International Olympic Committee*, 4 PACE Y.B. INT’L L. 97, 110–13 (1992) (arguing that the IOC’s funding of the CAS is detrimental to the CAS’s impartiality and purpose); Nelson, *supra* note 33, at 920–23 (discussing the CAS’s shortcomings).

³⁶ See *Martin v. Int’l Olympic Comm.*, 740 F.2d 670, 677 (9th Cir. 1984) (“[W]e find persuasive the argument that a court should be wary of applying a state statute to alter the content of the Olympic Games.”); see also NAFZIGER, *supra* note 14, at 67 (“[National] courts have traditionally denied standing to plaintiffs or otherwise dismissed actions on grounds of admissibility.”); Ansley, *supra* note 13, at 293 (“[D]omestic courts have been reluctant to interfere with international athletic governing bodies and have been willing to defer to international rules as set out by the IOC.”); Ettinger, *supra* note 35, at 107 (discussing American

Olympic Games, athletes usually will litigate in order to *protect* their already established right to compete.³⁷ More recently, however, women have brought litigation in order to *create* a right to compete and take their rightful place on the Olympic Programme.³⁸

1. The Olympic Programme: Why Women Are Excluded

The Olympic Charter outlines the Olympic Programme, which is considered the plan of all the Olympic athletic competitions for a specific Olympic Games.³⁹ The Olympic Programme consists of “sports, disciplines and events.”⁴⁰ Disciplines are branches of the broader sport category, and an event is a competition within a sport or discipline.⁴¹ For example, “[s]kiing is a sport, ski jumping is a discipline, and women’s 90-metre ski jumping would be an event.”⁴² Events ultimately lead to the awarding of rankings and medals.⁴³

In accordance with Rule 46 of the 2010 Olympic Charter, the IOC chooses the sports to include in the Olympic Programme no later than at the election of the host city for that edition of the Olympic Games.⁴⁴ This decision typically occurs at least seven years prior to

jurisprudence concerning the IOC and noting “the recognition and respect that the United States judiciary has for the IOC and its National Olympic Committee, the USOC”); Nelson, *supra* note 33, at 898 (“Amateur athletes . . . are left in a vulnerable position: their national courts defer to Olympic rule, while Olympic judicial processes provide inadequate means to protect their rights.”).

³⁷ See NAFZIGER, *supra* note 14, at 65 (discussing courts’ willingness to consider an athlete’s “right to work”); Ansley, *supra* note 13, at 277 (arguing that athletes are turning to litigation not only to protect their right to compete, but also to protect their legal and social interests); Nelson, *supra* note 33, at 898–99 (discussing the Olympic controversy surrounding Butch Reynolds’ suspension for testing positive for steroids, which resulted in a Supreme Court decision, *Reynolds v. Int’l Amateur Athletic Fed’n*, 505 U.S. 1301 (1992), ordering that he could not be stopped from competing; Reynolds ultimately did not qualify for the Olympic team, thus the IOC was able to avoid confronting the conflict between the suspension from competition and the Supreme Court ruling).

³⁸ See *Martin*, 740 F.2d at 679 (affirming the denial of a preliminary mandatory injunction requested by women runners and runners’ organizations requiring the IOC to include the 5,000 meter and 10,000 meter track events at the 1984 Olympics); *Sagen II* (2009), 98 B.C.L.R. 4th 141, para. 68 (Can. B.C.) (denying application for declaration that VANOC’s failure to include women’s ski jumping in the 2010 Vancouver Winter Olympic Games violated equality rights).

³⁹ See OLYMPIC CHARTER, *supra* note 12, at 86; see also *Sagen II*, 98 B.C.L.R. 4th 141 at para. 16–17 (discussing the provisions in the 2004 version of the Charter relating to the Olympic Programme).

⁴⁰ OLYMPIC CHARTER, *supra* note 12, at 86.

⁴¹ *Id.* (“A discipline is a branch of a sport comprising one or several events. An event is a competition in a sport or in one of its disciplines.”).

⁴² *Sagen I* (2009), 98 B.C.L.R. 4th 109, para. 111 (Can. B.C.).

⁴³ OLYMPIC CHARTER, *supra* note 12, at 86 (“An event is a competition in a sport or in one of its disciplines, resulting in a ranking and giving rise to the award of medals and diplomas.”).

⁴⁴ *Id.* at 87 (“The inclusion of any sport in the programme of any edition of the Olympic

the holding of the Games.⁴⁵ Yet, the IOC decides which disciplines and events to include no later than three years prior to the opening of the Games.⁴⁶

The controversy surrounding the exclusion of women's sports, disciplines, and events from the Olympic Programme is rooted in a rule the IOC adopted in 1949 to "slow the rapid growth of the number of Olympic events within recognized sports."⁴⁷ Rule 47 of the 2004 Olympic Charter, which was in effect at the time the controversy erupted over the inclusion of women's ski jumping at the 2010 Vancouver Winter Games, was the successor to the 1949 IOC rule.⁴⁸ It outlined the criteria for the inclusion of new sports and the review of existing sports within the Olympic Programme.⁴⁹

Generally for an event to be included in the Olympic Programme, the event must be internationally recognized, "both numerically and geographically, and have been included at least twice in world or continental championships."⁵⁰ Male events must first be practiced in at least fifty countries and on three continents, and female events must be first practiced in at least thirty-five countries and three continents, before they may be included in the Olympic Programme.⁵¹

The 1949 IOC rule, however, as shown through Rule 47, also has a grandfather mechanism for sports, disciplines, and events that cannot meet the Olympic Programme's entry requirements. A sport that does not meet the entry requirement threshold may still "be

Games shall be decided not later than at the Session electing the host city of that edition of the Olympic Games.").

⁴⁵ *Sagen I*, 98 B.C.L.R. 4th 109 at para. 112 ("The IOC decides at least seven years before an Olympic Games whether a sport will be included in that Games."); see also *Choice of the Host City*, INT'L OLYMPIC COMM., <http://www.olympic.org/content/Olympic-Games/Host-City/> (last visited Mar. 11, 2011) (describing the lifecycle of the Olympic Games, with the bidding phase starting approximately nine years before the Games, and the foundation planning phase beginning about seven years before the Games).

⁴⁶ OLYMPIC CHARTER, *supra* note 12, at 87 ("The inclusion of disciplines or events into the programme of any edition of any Olympic Games shall be decided by the IOC Executive Board not later than three years before the opening of the Olympic Games."); see also *Sagen I*, 98 B.C.L.R. 4th 109 at para. 112 ("The IOC Executive Board decides at least three years before an Olympic Games what disciplines and events will be included.").

⁴⁷ *Sagen I*, 98 B.C.L.R. 4th 109 at para. 84.

⁴⁸ *Id.* at para. 84.

⁴⁹ See *id.* at para. 81 (detailing admission criteria then in effect); see also Int'l Olympic Comm., 2004 OLYMPIC CHARTER 88–92 (2004) (providing detailed criteria for inclusion of a discipline, sport, or event in the Olympic Programme), available at http://www.olympic.org/Documents/OSC/Ressources/Bibliotheque/Olympic_Charter/2004%20-%20Olympic%20Charter.pdf.

⁵⁰ *Sagen I*, 98 B.C.L.R. 4th 109 at para. 81 (quoting Rule 47 of the 2004 Olympic Charter).

⁵¹ *Id.*

maintained [in the Olympic Programme] by decision of the IOC *for the sake of Olympic tradition.*"⁵²

There are three major rationales behind the IOC's policy against including newer sports into the Olympic Programme.⁵³ The first rationale is logistical: to control the number of athletes that the IOC and Olympic host cities must house and protect in the Olympic Village.⁵⁴ The second rationale is to preserve the prestige of the Olympics. By slowing the growth of sports, disciplines, and events in the Olympics, the IOC is better able to keep Olympic competition exclusively at the most elite level.⁵⁵ The third rationale reflects the IOC's desire to achieve parity amongst competing countries, regardless of a nation's development level or size. Because larger, developed countries are more likely to create and excel in newer sports, the IOC limits the official recognition of these new sports.⁵⁶ As a result, over the years the IOC has required many National Olympic Committees to reduce the size of their teams.⁵⁷ The IOC's ultimate goal is to have a "perfect balance of . . . nations participating without the accompanying threat of runaway gigantism."⁵⁸

Because of the IOC's history of discrimination against female athletes, however, the requirements of new sport review inherently contain an underlying level of sex discrimination.⁵⁹ In 1949, the year that the IOC created the predecessor to Rule 47, the IOC was still actively keeping women from participating in many events,

⁵² *Id.* at para. 84 (quoting Rule 47 of the 2004 Olympic Charter).

⁵³ See LUCAS, *supra* note 8, at 50–55 (discussing the balance that the IOC hopes to achieve in limiting the inclusion of new sports in the Olympics).

⁵⁴ See *id.* at 51 (noting that the organizers of the 1992 Barcelona Olympics prohibited excessive numbers of persons in the Olympic Village). This logistical concern has arguably only increased in recent years, especially with events such as the bombing of the Centennial Olympic Park during the 1996 Summer Olympic Games in Atlanta, Georgia. See *1996: Bomb Rocks Atlanta Olympics*, BBC http://news.bbc.co.uk/onthisday/hi/dates/stories/july/27/newsid_3920000/3920865.stm (last visited Feb. 28, 2011) (reporting on an explosion at the 1996 Atlanta Summer Olympics that injured as many as 200 people).

⁵⁵ See LUCAS, *supra* note 8, at 51–53 (discussing the proliferation of Olympic events and the dangers of such growth).

⁵⁶ See JEAN-LOUP CHAPPELET & BRENDA KÜBLER-MABBOT, *THE INTERNATIONAL OLYMPIC COMMITTEE AND THE OLYMPIC SYSTEM: THE GOVERNANCE OF WORLD SPORT* 55–58 (2008) (discussing efforts by Olympic Solidarity to foster medal parity between competing countries).

⁵⁷ See LUCAS, *supra* note 8, at 51 (noting that before the 1992 Barcelona Games, the IOC declared that many teams must reduce in size).

⁵⁸ *Id.*

⁵⁹ See, e.g., *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 681 (9th Cir. 1984) (Pregerson, J., dissenting) (arguing that the IOC's attitude toward women in the early twentieth century "resulted in a continuing disparity between male and female opportunities to compete in the Olympic Games"); *Sagen I* (2009), 98 B.C.L.R. 4th 109, para. 90 (Can. B.C.) (arguing that the IOC's historical discrimination against women, and its codification in Rule 47 of the 2007 Olympic Charter, is the sole reason why women's ski jumping is excluded from the Olympic Games).

disciplines, and sports; the IOC leadership did not break down this discriminatory philosophy until 1954.⁶⁰ Thus, male sports, events, and disciplines benefit from the grandfather provision of the Olympic Charter because they have existed long enough qualify as “Olympic tradition,” even if they do not satisfy Olympic Programme’s entry requirements. In contrast, female athletes have suffered because their sporting events were not created until after the 1950s, and thus are not old enough to be “grandmothered” in.⁶¹ As a result, women have consistently been denied the opportunity to compete at the Olympic Games, and to obtain the accompanying financial benefits, simply because of their sex.

Women’s ski jumping provides the most recent illustration of this discrimination. The IOC refused to add women’s ski jumping to the 2010 Olympic Programme, explaining that the competition in that event had not met the universality requirement⁶² because the International Ski Federation had registrations from female ski jumpers in only eighteen countries, totaling only 52% of the required threshold.⁶³ Men’s ski jumping, however, also fell short of the Olympic Charter’s requirements, with registrations from male ski jumpers in only twenty-nine countries, totaling only 58% of the required universality threshold.⁶⁴ Yet, men’s ski jumping was included because of the Olympic tradition exception in Rule 47.⁶⁵ Thus, the application of this grandfather provision clearly demonstrates discrimination on the basis of sex.

2. *Martin v. International Olympic Committee*

In addition to the recent example of women’s ski jumping in the Vancouver Olympics, a similar issue arose surrounding the 1984 Summer Olympic Games, when the IOC refused to let women compete in the 5,000-meter and 10,000-meter track events.⁶⁶ The IOC

⁶⁰ See *Martin*, 740 F.2d at 681 (Pregerson, J. dissenting) (noting that in 1954, the IOC voted to limit women’s participation in the Olympics to only certain “appropriate” sports).

⁶¹ See *id.* (arguing that it is unjust for the 1984 Los Angeles Summer Olympics to exclude two women’s track and field events while holding the exact same events for men); see also *Sagen I*, 98 B.C.L.R. 4th 109 at para. 90 (explaining that the women ski jumpers would have a chance to compete in the 2010 Winter Olympics in Vancouver, Canada but for their sex).

⁶² *Sagen I*, 98 B.C.L.R. 4th 109 at para. 85 (noting that Walter Sieber, a VANOC Board member, COC vice-president, and member of the Olympic Committee’s Olympic Games Programme Commission, had testified that the IOC had refused to add women’s ski jumping because the level of competition had not yet met the Olympic Programme’s universality requirement).

⁶³ *Id.* at para. 87.

⁶⁴ *Id.*

⁶⁵ *Id.* at para. 86.

⁶⁶ *Martin*, 740 F.2d at 673.

had traditionally excluded female athletes from these long-distance track events because of the historic belief that women's bodies were too weak for long races.⁶⁷ Also similar to the female ski jumpers, the IOC refused to acknowledge the women's 5,000-meter and 10,000-meter track events because of the 1949 Olympic Programme "threshold requirement," which, at the time, was enacted as Rule 32 of the 1970 Olympic Charter.⁶⁸

In *Martin v. International Olympic Committee*,⁶⁹ two runners' organizations and eighty-two female long-distance track runners from twenty-seven countries brought suit against all of the organizing bodies of the 1984 Los Angeles Summer Olympic Games.⁷⁰ They brought their suit under the Unruh Civil Rights Act of the California Civil Code and the Fifth and Fourteenth Amendments of the United States Constitution, claiming that their exclusion was impermissible gender discrimination in violation of the Equal Protection Clause.⁷¹ The athletes argued that the IOC's process for selecting Olympic events was grounded in a historical pattern of sex discrimination. They requested a preliminary injunction requiring the inclusion of their events.⁷²

The United States District Court for the Central District of California rejected their request,⁷³ and the United States Court of Appeals for the Ninth Circuit affirmed the decision.⁷⁴

The Ninth Circuit agreed with the district court that the IOC's decision to prohibit the women's races satisfied both the California Unruh Civil Rights Act and the United States Constitution. The Ninth Circuit held the Unruh Civil Rights Act might not apply to the track events themselves, and, even if the Act did apply, the Act could not require the creation of a women's Olympic track event.⁷⁵ The women runners did not ask for the right to compete alongside men, but instead sought for the creation of an entirely separate set of events

⁶⁷ See *id.* at 681 (Pregerson, J., dissenting) (noting that in the past the IOC had limited women's participation to only those events that were considered appropriate for women at the time). In fact, women's track and field events were first introduced in 1928, but the IOC limited women's races to no more than 200 meters because several women had collapsed after running 800 meter races. The IOC continued this policy for 32 years, when in 1960, the IOC reinstated the women's 800 meter race. *Id.*

⁶⁸ *Id.* at 674.

⁶⁹ 740 F.2d 670 (9th Cir. 1984).

⁷⁰ *Id.* at 673.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Martin v. Int'l Olympic Comm.*, No. CV 83-5847 Kn, 1984 U.S. Dist. LEXIS 24941, at *49 (C.D. Cal. Apr. 16, 1984) (displaying sympathy for the plaintiffs' case, but finding in favor of the defendants on all claims).

⁷⁴ *Martin*, 740 F.2d at 679.

⁷⁵ *Id.* at 676.

reserved exclusively for female participants. As a result, the Ninth Circuit stated that it “simply [did] not read the Act to compel the creation of separate but equal events for women.”⁷⁶ The court also held that the IOC’s decision to limit the recognition of new sports did not constitute “arbitrary discrimination” against women, and, therefore, satisfied the Unruh Civil Rights Act.⁷⁷

The Ninth Circuit also rejected the plaintiffs’ constitutional claims under the Fifth and Fourteenth Amendments. Specifically, the court found Rule 32 was facially neutral because it governed the selection of new Olympic events without express reference to the athletes’ gender,⁷⁸ and could only be found unconstitutional if it had an invidious discriminatory purpose against women.⁷⁹ The Ninth Circuit ruled that the district court’s application of the disparate impact test⁸⁰ and its conclusion that the rule was neither overtly nor covertly discriminatory, was appropriate.⁸¹ Thus, the Ninth Circuit found that a preliminary injunction to create the women’s event was improper.⁸²

3. *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*

The remnants of the discriminatory policy in *Martin* ultimately led to the lawsuit over the right of women ski jumpers to participate in the 2010 Winter Olympic Games in Vancouver, British Columbia, Canada. In May of 2008, fifteen highly ranked female ski jumpers, and other women seeking to become highly ranked ski jumpers from five countries, filed an allegation with the Supreme Court of British

⁷⁶ *Id.*

⁷⁷ *Id.* at 677.

⁷⁸ *Id.* at 678.

⁷⁹ *Id.*

⁸⁰ In accordance with the framework outlined by the Supreme Court, courts must first determine whether the classification is actually neutral, and not overtly or covertly gender-based. *Martin*, 740 F.2d at 678 (citing *Feeney*, 442 U.S. at 274). Secondly, courts shall determine whether the “adverse effects under the classification reflect invidious gender-based discrimination.” *Id.* (citing *Feeney*, 442 U.S. at 274). In this second step of the analysis, courts may consider various factors, including:

The historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes. . . . The specific sequence of events leading up to the challenged decision may also shed some light on the decisionmaker’s purposes. . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

Id. (alterations in original) (quoting *Arlington Heights*, 429 U.S. at 267).

⁸¹ *Id.*

⁸² *Id.* at 679.

Columbia that the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Games was in violation of the Canadian Charter of Rights and Freedoms (“Canadian Charter”).⁸³

VANOC was the Organizing Committee for the Olympic Games (“OCOG”) established on September 30, 2003 to “support and promote the development of sport in Canada by planning, organizing, financing and staging the 2010 Olympic and Paralympic Winter Games.”⁸⁴ Although VANOC was created as a private entity and was incorporated in Canada as a nonprofit corporation,⁸⁵ it had a governmental foundation. The twenty-member board of directors that led VANOC was nominated by governmental entities, including the Government of Canada, the Province of British Columbia, the City of Vancouver, the Resort Municipality of Whistler, and the local First Nations.⁸⁶

The Canadian Charter is Canada’s Bill of Rights and makes up the first part of the Canadian Constitution.⁸⁷ The Charter guarantees civil rights to all in Canada through the policies and actions of the government at all levels.⁸⁸ The female ski jumpers accordingly alleged that VANOC’s hosting and staging of ski jumping events for men, but not for women, was in violation of § 15(1) of the Canadian Charter,⁸⁹ which guarantees “equal[ity] before and under the law and . . . equal protection and equal benefit of the law . . . without discrimination”⁹⁰

The Supreme Court of British Columbia determined that *Sagen* presented three major issues: 1) Does the Canadian Charter apply to VANOC; 2) If the Canadian Charter does apply to VANOC, did VANOC breach § 15 of the Canadian Charter; and 3) If a breach of the Canadian Charter took place, did § 1 of the Canadian Charter render the infringement moot.⁹¹

First, the court determined that the Canadian Charter did apply to VANOC, despite the fact that the Canadian Charter dealt with the

⁸³ *Sagen I* (2009), 98 B.C.L.R. 4th 109, para. 1–3 (Can. B.C.).

⁸⁴ World Conference on Sport and the Environment, *The Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, About VANOC*, http://www.wcse2009.com/about_vanoc.cfm (last visited Mar. 7, 2011) [hereinafter *About VANOC*].

⁸⁵ *Sagen I*, 98 B.C.L.R. 4th 109 at para. 2.

⁸⁶ *About VANOC*, *supra* note 84.

⁸⁷ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

⁸⁸ *Id.*

⁸⁹ *Sagen I*, 98 B.C.L.R. 4th 109 at para. 3.

⁹⁰ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act § 15(1), 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

⁹¹ *Id.* at para. 9.

policies and actions of the Canadian government.⁹² The court held that even though VANOC was established as a private nonprofit corporation, VANOC was still subject to the Canadian Charter because it was essentially carrying out a “government activity” during the host city bidding process and when it entered into contracts leading up to the 2010 Games.⁹³

Second, the court had to determine whether VANOC was in breach of § 15(1) of the Canadian Charter.⁹⁴ This section reads, “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, *sex*, age or mental or physical disability.”⁹⁵ The court found that grandfathering men’s ski jumping into the Olympic Games under Rule 47, while forcing women to meet the Olympic Programme threshold, was indeed discriminatory.⁹⁶

Yet, although the court found the IOC’s refusal to add women’s ski jumping to the Olympic Programme discriminatory, it noted that the IOC was not a named defendant in the suit.⁹⁷ The court recognized the plaintiff’s suggestion that VANOC was merely “implementing” the discriminatory decision of the IOC.⁹⁸ The plaintiffs had argued that VANOC imported the IOC’s discrimination and, to comply with the Canadian Charter, had to disregard the IOC’s direction concerning their exclusion from the Olympic Programme.⁹⁹ Accordingly, the court found that VANOC bore no responsibility for the Olympic Programme. The court stated:

VANOC cannot be held to be in breach of the *Charter* in relation to [IOC] decisions that it cannot control. VANOC did

⁹² *Id.* at para. 10; *see also* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act § 32(1), 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) (stating that the Charter applies to the Parliament and government of Canada, as well as to the legislature and government of each Canadian province).

⁹³ *Sagen*, 98 B.C.L.R. 4th 109 paras. 49–65 (finding VANOC was subject to the Canadian Charter after applying the “activity test,” which determines if the organization’s activities are truly ‘governmental’ in nature) (citation omitted).

⁹⁴ *Id.* at para. 67. To determine whether § 15 of the Charter applied, the court applied a two-part test, set out by the Supreme Court of Canada, in which a plaintiff must show that 1) the law creates a distinction based on an enumerated or analogous ground, and 2) the distinction creates a disadvantage by perpetuating prejudice or stereotyping. *Id.* at para. 68.

⁹⁵ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act § 15(1), 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) (emphasis added).

⁹⁶ *Sagen I*, 98 B.C.L.R. 4th 109 para. 103.

⁹⁷ *Id.* at para. 104.

⁹⁸ *Id.* at para. 104, 113.

⁹⁹ *Id.* at para. 113.

not make the decision to exclude women's ski jumping from the 2010 Games. VANOC did not support that decision. VANOC does not have the power to remedy it.¹⁰⁰

Finally, the court determined that the last major issue raised by the parties, whether § 1 of the Canadian Charter removed VANOC from liability, did not need to be addressed because the IOC, and not VANOC, had breached the Canadian Charter.¹⁰¹

The Honorable Madam Justice Fenlon, who wrote the opinion, expressed sympathy for the women and stated that the exclusion of women's ski jumping from the 2010 Games was blatant sex discrimination.¹⁰² Yet, the court concluded that the plaintiffs had sued the wrong defendant, explaining that the IOC was not a party to the suit and was also not subject to the Canadian Charter.¹⁰³ VANOC argued throughout the litigation that it was wrongfully named as the defendant in the case, and only the IOC had the right to set the Olympic Programme and add sports, disciplines, and events.¹⁰⁴

On November 13, 2009, a panel of judges on the British Columbia Court of Appeal dismissed the female ski jumpers' appeal.¹⁰⁵ The court found that the Canadian Charter does not apply to the selection of events for the Olympic Games, and even if it did apply, Rule 47 would not constitute a breach of § 15(1).¹⁰⁶ The court reasoned that the IOC, holding supreme authority over all decisions of the Olympic Games and Movement,¹⁰⁷ had the last authority over the Olympic Programme. The court further reasoned that there was no dispute over the fact that the IOC determined the Olympic Programme for the Games.¹⁰⁸ Thus, since VANOC was given authority to organize the

¹⁰⁰ *Id.* at para. 121.

¹⁰¹ *Id.* at para. 130.

¹⁰² *Id.* at para 7.

¹⁰³ *See id.* at para. 132 (stating that the Court must deny the plaintiffs a remedy because the discrimination they experienced was by a non-party who was not subject to the Canadian Charter).

¹⁰⁴ *Id.* at para. 4. The plaintiffs likely chose to pursue the suit against VANOC instead of the IOC because the IOC could not be held responsible to the Canadian Charter as it was neither a government entity nor was it carrying out government activities. *See id.* at para. 103 (stating that the IOC was not governed by the Canadian Charter).

¹⁰⁵ *Sagen II* (2009), 98 B.C.L.R. 4th 141, para. 68 (Can. B.C.).

¹⁰⁶ *Id.* at para. 6.

¹⁰⁷ *Id.* at para. 9 (describing the Olympic Movement and stating that it is under the supreme authority of the IOC); *see also* OLYMPIC CHARTER, *supra* note 12, at 13 ("Under the supreme authority of the International Olympic Committee, the Olympic Movement encompasses organisations, athletes and other persons who agree to be guided by the Olympic Charter."); Ansley, *supra* note 13, at 283 ("Any person or organization involved in the Olympic Movement in any capacity is bound by the Olympic Charter and the decisions of the IOC."); Forgues, *supra* note 8, at 261–62 (describing the IOC as the "International God").

¹⁰⁸ *Sagen II*, 98 B.C.L.R. 4th 141 at paras. 16–17, 48 (describing how the IOC's Executive

Games only under the IOC,¹⁰⁹ the court found that “deciding which events to include in the 2010 Games [was] not an activity to which the *Charter* applies.”¹¹⁰

The appellate court also reasoned that the women’s “greatest challenge” in their suit was to show that the unequal benefit given to the men was in “some way a product of ‘law.’”¹¹¹ The appellate court disagreed with the trial judge’s finding that VANOC’s contractual relationships created by the Multiparty Agreement¹¹² and the Host City Contract¹¹³ amounted to law under § 15(1) of the Canadian Charter.¹¹⁴ Yet, the court reasoned that to be found “law” under the Canadian Charter, a provision generally derives from statutory authority,¹¹⁵ and declined to extend case law to cover the contractual relationship established in hosting the Olympics.¹¹⁶ The women ski jumpers made one last effort before the February 2010 Games, and submitted their case to the Supreme Court of Canada. In December 2009, the Supreme Court announced it would deny hearing the appeal.¹¹⁷

Board determines the Olympic Programme, and stating that the IOC has ultimate authority to determine the events at the Olympic Games).

¹⁰⁹ *Id.* at para. 11–13 (stating that once the IOC chooses a host city, the host city must incorporate an organizing committee who facilitates the Olympic Games, and that once Vancouver was selected for the 2010 Winter Olympics, VANOC was incorporated to fulfill that purpose).

¹¹⁰ *Id.* at para. 50.

¹¹¹ *Id.* at para. 56.

¹¹² The Multiparty Agreement was entered into on November 14, 2002, among Canada, the Province of British Columbia, the City of Vancouver, the Resort Municipality of Whistler, the Canadian Olympic Committee, the Canadian Paralympic Committee, and the Vancouver 2010 Bid Corporation. Multiparty Agreement for the 2010 Winter Olympic and Paralympic Games 2, Nov. 14, 2002, available at <http://www.2010bcsecretariat.ca/StaticContent/Downloads/Multi-partyagreementEnglish.pdf>. The Multiparty Agreement outlines the expected financial and legal roles and contributions of the parties involved. *Id.* at 12–14.

¹¹³ Vancouver was selected as the Host City for the 2010 Games on July 2, 2003. On October 20, 2003, VANOC, the City of Vancouver, and the Canadian Olympic Committee entered into the Host City Contract. *Sagen II*, 98 B.C.L.R. 4th 141 at para. 13; see HOST CITY CONTRACT FOR THE XXI WINTER OLYMPIC GAMES IN THE YEAR 2010, July 2, 2003 (on file with author).

¹¹⁴ *Sagen II*, 98 B.C.L.R. 4th 141 at paras. 58–66.

¹¹⁵ *Id.* at para. 60 (“[Not] all obligations and entitlements under government contracts constitute ‘law’ for the purposes of s. 15(1) of the *Charter*. Rather, [the leading cases] stand for the proposition that deliberately and formally adopted policies of government may constitute ‘law’ notwithstanding that they are embodied in contractual documents rather than in legislative acts or statutory instruments.”).

¹¹⁶ *Id.* at para. 62–63.

¹¹⁷ *Sagen III* (2009) 3 S.C.R. ix (Can.), 2009 S.C.R. LEXIS 126; see also *Supreme Court Spurns Women Ski Jumpers*, *supra* note 10 (discussing the women’s ski jumping community’s disappointment in 2010 and its conviction to attain Olympic recognition in 2014).

II. *MARTIN & SAGEN*: TWENTY-FIVE YEARS PROVES LITIGATION IS NOT A FEASIBLE ROUTE AND OLYMPIC REFORM IS NECESSARY

Although *Martin* and *Sagen* arose in different nations and under different legal systems, an analysis of the legal arguments and the resulting reasoning given by their respective courts helps demonstrate that litigation cannot be an effective route for athletes who wish to protest or change IOC policies.

A. *The IOC as Defendant and the Deference of National Courts*

In *Martin*, the female runners named all the organizing bodies of the 1984 Olympic Games as defendants, including the IOC;¹¹⁸ whereas, the female ski jumpers in *Sagen* chose only to name VANOC as the defendant.¹¹⁹ In *Sagen*, VANOC argued that the plaintiffs failed to name the appropriate defendant to the suit, the IOC.¹²⁰ Both the British Columbia Supreme Court and Court of Appeal believed that the issue presented by the women was truly a decision that the IOC controlled.¹²¹ Nonetheless, it is likely that the plaintiffs' counsel in *Sagen* was fully aware of the implications of naming the IOC to the suit given the history of deference to the IOC's decisions.

A review of *Martin*, as well as a number of other cases, shows that the courts of host nations have great deference for the IOC's decisions.¹²² For example, in *Martin*, the Ninth Circuit displayed particular deference to the Olympic Charter as an international agreement. Consequently, the court was hesitant to order an alteration to the Olympic Programme based on a state statute, when the Olympic regime is such that all participating countries must operate in accord with one another.¹²³ Additionally, in *San Francisco Arts &*

¹¹⁸ *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 673 (9th Cir. 1984).

¹¹⁹ *Sagen II*, 98 B.C.L.R. 4th 141 at para. 1.

¹²⁰ *Sagen II*, 98 B.C.L.R. 4th 141 at para. 15 (“[T]he IOC exercises day-to-day control over VANOC and has control over the minute details of VANOC’s operations in planning the 2010 Games.” (internal citation and quotation omitted)).

¹²¹ *Sagen II*, 98 B.C.L.R. 4th 141 at para. 23 (“VANOC does not have the power to remedy [the decision to exclude women’s ski jumping.]”); *Sagen I*, 98 B.C.L.R. 4th 109 at para. 127 (“VANOC has no power either to order the inclusion of women’s ski jumping in the Olympic Programme or to order the removal of men’s ski jumping from the 2010 Games.”).

¹²² *Martin*, 740 F.2d at 677 (expressing hesitancy in applying state law to alter a world-wide event governed by an international agreement); see Ansley, *supra* note 13, at 294 (noting how U.S. courts have denied standing to individual athletes as a way of avoiding controversy with international sports bodies); Ettinger, *supra* note 35, at 105–09 (noting several cases in which U.S. courts showed great deference to the decisions of the IOC).

¹²³ *Martin*, 740 F.2d at 677 (“We are extremely hesitant to undertake the application of one state’s statute to alter an event that is staged with competitors from the entire world under the terms of that agreement.”); Ettinger, *supra* note 35, at 106 (“The *Martin* court’s refusal to

Athletics, Inc. v. United States Olympic Committee,¹²⁴ the Supreme Court of the United States deferred to the IOC when it held the IOC and the United States Olympic Committee (“USOC”) could prohibit the “Gay Olympic Games” from using the word “Olympic.”¹²⁵ Further, even the dissenters agreed that the IOC deserved great deference, describing it as a “highly visible and influential international body.”¹²⁶

This deference may also be a result of the Olympic Charter mandate that supreme authority for all decisions regarding the Olympic Movement belongs to the IOC Executive Committee.¹²⁷ All participating athletes and countries must adhere to the Olympic Charter if they wish to avoid sanctions and consequences,¹²⁸ which may even include the withdrawal of medals and disqualification from participation.¹²⁹ Ultimately, those who respond with deference to the IOC are more likely to benefit from its decisions, particularly in the selection of future Olympic Host Cities.¹³⁰

This deference arguably led the United States executive branch to file a Statement of Interest, opposing judicial intervention in *Ren-Guey v. Lake Placid 1980 Olympic Games, Inc.*¹³¹ In *Ren-Guey*, the IOC required Taiwan to submit an alternative national flag, anthem, and emblem, while enabling the People’s Republic of China to use their nation’s flag, anthem, and emblem.¹³² As a result, the plaintiff, an athlete selected to compete for Taiwan, filed for an injunction to stay the Olympic Games if he was unable to use the flag, anthem, and

permit domestic laws to supersede an IOC decision . . . illustrates ‘international cooperation’ for the existence and respect of the IOC’s power to make decisions concerning the Games.”).

¹²⁴ 483 U.S. 522 (1987).

¹²⁵ *See id.* at 546–47 (holding that USOC cannot be held liable for the alleged discriminatory enforcement of its rights to the word “Olympic”).

¹²⁶ *Id.* at 550 (Brennan, J., dissenting).

¹²⁷ OLYMPIC CHARTER, *supra* note 12, at 11 (stating that the IOC has supreme authority over the Olympic Movement).

¹²⁸ *See* Ansley, *supra* note 13, at 285 (“[T]he nations and individuals who participate in the Olympic Games submit themselves to the rules and regulations established by the IOC and to subsequent sanctions for violating those rules.”).

¹²⁹ *See id.* at 292 n.140 (listing the numerous consequences for violating IOC rules).

¹³⁰ *See, e.g.,* Forgues, *supra* note 8, at 262 (“The IOC makes powerful decisions that deeply impact all the states around the world. The states that have gained IOC favor are likely to benefit from the IOC decisions, whereas a state that has earned the disfavor of the IOC is likely to bear the brunt of the IOC decisions.”).

¹³¹ 424 N.Y.S.2d 535 (N.Y. App. Div. 1980), *aff’d*, 403 N.E.2d 178 (N.Y. 1980) (per curiam); *see also* Ettinger, *supra* note 35, at 107–08 (stating that the executive branch’s Statement of Interest in *Ren-Guey* displayed its support for the “IOC’s international personality”).

¹³² *Ren-Guey*, 424 N.Y.S.2d at 536–37.

emblem of the People's Republic of China.¹³³ The Statement of Interest explained that the United States had a foreign policy interest in adhering to the IOC's decision; if it did not defer, it would potentially lose its ability to host international sporting events like the Olympics in the future.¹³⁴ Ultimately, the New York Court of Appeals refrained from exercising jurisdiction to resolve the "dispute which has at its core the international 'two-Chinas' problem."¹³⁵

In the United States, courts have consistently denied standing to individual athletes to avoid adjudicating disputes against the IOC.¹³⁶ One famous example is the controversy surrounding *Reynolds v. International Amateur Athletic Federation*,¹³⁷ which continued for over four years through fifteen stages of arbitration and litigation.¹³⁸ Originally, the district court stayed Reynolds's litigation proceedings until he could show that he had exhausted all remedies available to him through the sporting organizations.¹³⁹ After he had won a \$27 million default judgment against the IAAF when it refused to appear in the proceedings, the court ultimately dismissed his case for lack of jurisdiction, even though the real issue before the court had been choice of law, which the court entirely overlooked.¹⁴⁰ Many view courts' respect for and deference to the international nature of Olympic rule as problematic for athletes who have disputes against the IOC.¹⁴¹

¹³³ *Id.* at 537.

¹³⁴ See Ettinger, *supra* note 35, at 108.

¹³⁵ *Ren-Guey*, 403 N.E.2d at 179.

¹³⁶ See Ansley, *supra* note 13, at 294 (explaining that U.S. courts typically deny standing to athletes in deference to the internal dispute resolution procedures of sporting organizations); see also NAFZIGER, *supra* note 14, at 73 ("English and American courts are similarly reluctant to interfere with the decisions of sports associations."); Nelson, *supra* note 33, at 907 (arguing that courts are reluctant to hear cases brought by athletes against sporting organizations unless the athletes have first exhausted all of the organizations' internal dispute resolution procedures).

¹³⁷ 505 U.S. 1301 (1992) (granting Reynolds' application to stay the decision of the Sixth Circuit Court of Appeals).

¹³⁸ See NAFZIGER, *supra* note 14, at 74–83 (discussing the Butch Reynolds controversy in detail); Merrell Noden, *Butch Reynolds*, SPORTS ILLUSTRATED, Feb. 15, 1993, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1137443/index.htm> (covering the career and comeback of Butch Reynolds after he tested positive for steroids in 1990).

¹³⁹ See Nelson, *supra* note 33, at 907–08 (discussing the Reynolds controversy).

¹⁴⁰ See NAFZIGER, *supra* note 14, at 74.

¹⁴¹ See, e.g., Ansley, *supra* note 13, at 301 (arguing that the fundamental principles of the Olympic Movement may be at stake if the IOC refuses to resolve the dilemma of athletes who are left without judicial recourse or remedies against IOC decisions); Nelson, *supra* note 33, at 925 (noting that while some argue international sporting organizations "may be willing to compromise some of their authority in an effort to resolve the conflicts between national governments and Olympic rule . . . the IOC still seems reluctant to afford athletes much more control over sport than they currently have").

B. Basis of the Lawsuit: State/Provincial or National

Because of their understanding of the difficulty inherent in challenging the IOC, the plaintiffs in *Sagen* likely did not name the IOC as a party strategically, believing their greatest chance for success in a discrimination suit was against VANOC, a Canadian organization, under the Canadian Charter. The plaintiffs in *Martin* sought to prove that the IOC violated both a California statute and their rights to equal protection under the Fifth and Fourteenth Amendments of the Constitution;¹⁴² whereas, the plaintiffs in *Sagen* argued that VANOC violated the Canadian Charter.¹⁴³ In their tactical approach, the *Sagen* plaintiffs argued that VANOC, an organization formed by branches of the Canadian government, was carrying out a government activity, and thus, was subject to the Canadian Charter.¹⁴⁴ The plaintiffs likely chose to commence litigation against VANOC because they would have been unable to prove that the IOC was liable under the Canadian Charter, as the IOC is not under the control of the Canadian government.¹⁴⁵ Even if the IOC had been named a party, contrary to what the *Sagen* courts suggest, the likelihood of the women seeing their event become Olympic would have been even more remote because of the history of national court deference to the IOC.¹⁴⁶

It is also likely that having reviewed *Martin*, the plaintiffs wanted to bring the suit under the Canadian Constitution because they believed that the Canadian court would be more likely to rule against the IOC on a founding document of a nation, rather than a provincial or state statute.¹⁴⁷ Thus, while there may have been other, more applicable provincial or even national laws under which the ski jumpers may have brought their suit, bringing suit under the Canadian Charter was likely an intentional attempt to forcefully show that the Olympic Movement was seriously out of line with modern thinking.

¹⁴² *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 673 (9th Cir. 1984). In refusing the plaintiffs' preliminary injunction, however, the district court held that the plaintiffs failed to demonstrate the likelihood of success of their equal protection claims. Likewise, the Ninth Circuit refused to consider this constitutional question, preferring to dispose of the plaintiffs' appeal on statutory grounds. *Id.* at 675.

¹⁴³ *Sagen II* (2009), 98 B.C.L.R. 4th 141, para. 1 (Can. B.C.).

¹⁴⁴ *Id.* at paras. 12–18. However, the Court ultimately found that VANOC was not sufficiently controlled by government, and, thus, not subject to the Canadian Charter. *Id.* at para. 19–24.

¹⁴⁵ *See id.* at para. 49 (“The decision of the IOC not to add women’s ski jumping as an event into the 2010 Games is not a ‘policy’ choice that could be or was made by any Canadian government . . .”).

¹⁴⁶ *See supra* Part II.A.

¹⁴⁷ *See Martin*, 740 F.2d at 677 (reasoning that the international nature of the Olympic Charter as an agreement should not be altered by a state statute).

C. *The Earlier the Better?*

Martin and *Sagen* both noted the timing in which these women brought their suits, and the hesitancy of the courts to force changes to the Olympic Programme so far along in the planning process of the Games.¹⁴⁸ *Sagen* emphasized that the IOC sets aspects of the Olympic Programme years before the selection of the Host City.¹⁴⁹ However, for reasons inherent with athletics, such as new competitors, injuries, and burnouts, it would be impractical and unrealistic for these women to have brought their suit any earlier. The mean age of these women who were bringing this suit was approximately twenty-one in September of 2008, shortly after the plaintiffs filed their complaint.¹⁵⁰ If the athletes would have brought the suit earlier, they would have faced judicial questioning about their “speculative” interest in an injunction. For example, some of the women may have not been able to predict attaining the elite competitive level until after the 2008–2009 ski jumping seasons. Canadian ski jumpers Charlotte Mitchell and Meaghan Reid, who were fourteen and fifteen years of age at the time the complaint was filed,¹⁵¹ likely faced this dilemma, and as a result, did not join the litigation until March 2009.¹⁵² Additionally, many slightly older athletes may have worried about their ability to remain at the elite competitive level into the 2010 Olympics Games, like American ski jumper Karla Keck and Canadian ski jumper Marie-Pierre Morin, who were thirty-three and twenty-six at the time the litigation was filed.¹⁵³

The women were also likely under the impression that women’s ski jumping would have made its way into the Olympics by the time their “time” came. The court in *Sagen* noted at the time VANOC

¹⁴⁸ *Id.* at 675 (discussing the district court’s attempts to balance the interests of the athletes with the needs of the IOC in having to logistically and administratively plan for the Olympic Games); see also *Sagen I* (2009), 98 B.C.L.R. 4th 109, para. 115 (Can. B.C.) (finding that VANOC, for a number of legal and practical reasons, did not have the capacity to host women’s ski jumping in the 2010 Games).

¹⁴⁹ *Sagen I*, 98 B.C.L.R. 4th 109 at paras. 110–12 (noting that the IOC has the exclusive authority to set the Olympic Programme and often chooses which sports will be included in a particular Olympics at least seven years before the Games begin).

¹⁵⁰ See Damian Inwood, *Alberta Skiers Leap into Women’s Ski-Jumping Suit*, THEPINKELEPHANT.COM (Mar. 6, 2009), <http://thepinkelephant.ca/archives/1243> (stating that plaintiff Meaghan Reid was fifteen years old as of March 6, 2009); *Canadian Female Ski Jumper Joins Olympic Lawsuit*, CBC (Oct. 1, 2008, 4:02 PM), <http://www.cbc.ca/sports/amateur/story/2008/10/01/ski-jumping.html> (last visited Mar. 7, 2011) (discussing the lawsuit and profiling some of the plaintiffs); *FIS-Ski-Biographies*, INT’L SKI FED’N, <http://www.fis-ski.com/uk/competitorbiographies.html> (providing birth dates for thirteen of the fifteen *Sagen* plaintiffs).

¹⁵¹ See Inwood, *supra* note 150.

¹⁵² *Id.*

¹⁵³ See *FIS-Ski-Biographies*, *supra* note 150.

signed the Multiparty Agreement in November 2002 that “it was anticipated that women’s ski jumping would be an Olympic event in the 2010 Games.”¹⁵⁴ Accordingly, the injustice to the women did not come about until the IOC finalized the disciplines and events for the 2010 Games. As the IOC did not set the Olympic Programme for the 2010 Games until November of 2006,¹⁵⁵ the 2008 timing of the women’s suit filing cannot be seen as late.

Although the *Martin* and *Sagen* courts both suggested that bringing their suits earlier may have been advantageous to the plaintiffs,¹⁵⁶ their respective sporting organizations may have been better plaintiffs because they would have recognized the harm of the exclusion of future member athletes.¹⁵⁷ The individual sporting organizations, however, chose not to participate in litigation against the IOC, perhaps motivated by a desire to comply with the rules of the IOC and a fear that litigation would have an adverse impact on the other sports that the organizations sponsor, and which the IOC includes in the Games.¹⁵⁸

D. Alternative Forums and the Difficulty of Enforcement

While it is possible that the women may have been successful in another country with more progressive laws that may have been more outraged with this discrimination, ultimately, the problem is still an issue of enforcement. National courts may also have only limited enforcement mechanisms against the IOC. Due to its multinational status, the IOC may not necessarily be liable under the laws of any

¹⁵⁴ *Sagen I* (2009), 98 B.C.L.R. 4th 109, para. 122 (Can. B.C.).

¹⁵⁵ *See Sagen II* (2009), 98 B.C.L.R. 4th 141, para. 18 (Can. B.C.) (noting that it was not until November 2006 that “the IOC decided not to include women’s ski jumping in the Programme”).

¹⁵⁶ *See supra* note 148 (discussing how both the *Martin* and *Sagen* courts attempted to balance the interests of the athletes relative to the interests of the IOC in organizing a new sporting event so close to the opening of the Winter Games).

¹⁵⁷ *See, e.g.,* *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 342–43 (1977) (finding associational standing is proper under American jurisprudence when the association’s 1) members could sue on their own, 2) interests it seeks to maintain relate to the association’s purpose, and 3) claim and relief requested do not require participation of each individual member).

¹⁵⁸ *See, e.g.,* Claire Suddath, *Why Can’t Women Ski Jump?*, TIME, Feb. 11, 2010, <http://www.time.com/time/nation/article/0,8599,1963447,00.html> (summarizing the comments of Joe Lamb, U.S. Ski Team representative to the International Ski Federation, who believed that the exclusion of the female ski jumpers was motivated not by discrimination, but by the fact that the Olympics can only accommodate a finite number of athletes). In September 2009, however, the International Ski Federation did join the women ski jumpers fight to become part of the 2014 Olympic Programme. *See* Catherine Forsythe, *FSI Joins Protest over Exclusion of Women’s Ski Jumping*, IWOMENSPO RTS (Sept. 4, 2009), <http://iwomensports.com/2009/09/the-fsi-joins-the-protest-of-the-exclusion-of-womens-ski-jumping/>.

particular country.¹⁵⁹ With the vast number of laws and legal systems around the world, it would be hard for the judiciary of one country to hold the IOC subject to its laws over others.¹⁶⁰ Additionally, any such country would run the risk of IOC sanctions and negative consequences for its actions.¹⁶¹ Thus, even if the women brought suit in a more favorable country where the likelihood of a successful court ruling may have been greater, the probability that the women would have actually achieved their desired goal of incorporation into the Olympic Games, would not have increased.

E. Possibility of Alternative Remedies

Although the plaintiffs in *Sagen* ultimately chose to pursue the remedy of specific performance—include women’s ski jumping in the 2010 Games or, in the alternative, exclude men’s ski jumping—the plaintiffs were aware that VANOC was unable to host and stage an “Olympic” ski jumping event without the consent of the IOC for a host of legal and practical reasons.¹⁶² Not only would no one consider the event “Olympic” without the permission of the IOC, but the organizers of the event, without the IOC, would have difficulty securing not only international officials and judges but also funding—a substantial portion of which is given to the national teams by the IOC.¹⁶³ In seeking the removal of the men’s events, the women claimed that they were only looking to create “fairness and equality to all,”¹⁶⁴ which would pressure the IOC to create women’s events, as the cancellation of the men’s events would be an unlikely and undesirable solution.¹⁶⁵ One could argue that an alternative remedy would have actually moved the women closer to the outcome they were ultimately seeking, albeit, at a slower pace.

The award of damages to the women would have assisted them financially in continuing their pursuit for their Olympic dream in the

¹⁵⁹ See *Martin v. Int’l Olympic Comm.*, 740 F.2d 670, 677 (9th Cir. 1984) (describing the Olympic Charter as an international agreement).

¹⁶⁰ See *id.* (“We are extremely hesitant to undertake the application of one state’s statute to alter an event that is staged with competitors from the entire world under the terms of [the Olympic Charter].”).

¹⁶¹ See *supra* Part II.A (discussing how countries treat IOC decisions with great deference out of a fear that the IOC will react negatively to an individual country’s athletes and Host City bids).

¹⁶² See *Sagen I* (2009), 98 B.C.L.R. 4th 109, para. 4–5 (Can. B.C.) (stating that the IOC, and not VANOC, has the exclusive authority to decide which games and events will be represented at the Olympics).

¹⁶³ *Id.* at para. 116–18 (discussing the central role of the IOC in the funding and logistics of the Olympic Games).

¹⁶⁴ *Id.* at para. 6.

¹⁶⁵ *Id.*

next four years. Ski jumper Lindsey Van commented that although she is young enough to continue training for the next four years, finances may become a deterrent in her decision to continue her pursuit of Olympic gold,¹⁶⁶ as athletes at this level incur costs for training, equipment, competition fees, and travel expenses. It becomes difficult for these women to stay involved in the sport because of the exorbitant costs, especially when they watch their male counterparts accumulate sponsorships and funding.¹⁶⁷ Especially in a constricting economy where even the United States Ski Team has cut all funding for men's and women's ski jumping in the past year, there is a growing concern as to how these women will pay for their participation.¹⁶⁸

The *Sagen* plaintiffs may not have pursued damages in the British Columbia courts because the litigation was in fact their second attempt to gain incorporation into the 2010 Games. The plaintiffs had previously filed a complaint with the Canadian Human Rights Commission against the Government of Canada.¹⁶⁹ Their remedy request stated:

The Department of Canadian Heritage, in concert with other government officials, must put pressure on the IOC to reverse the decision and remove the shadow from the 2010 Olympics. The IOC's disrespect of Canadian values of gender equity should not go unchallenged by the federal government.

If the IOC refuses to reverse the situation, the Department of Canadian Heritage, as a major event funder, should be required to offset the negative consequences of the exclusion of women's ski jumping from the 2010 Olympics. This would include measures such as funding an international-level women's competition in 2010 as an alternative to the Olympics and also ensuring federal funding for Canadian

¹⁶⁶ See Berkes, *supra* note 5 ("When you get into a sport of this caliber at a high level, people are making money through sponsors . . . [b]ut it's hard to get a sponsor if you're not in the Olympics.").

¹⁶⁷ See, e.g., Meri-Jo Borzilleri, *With No Olympic Women's Ski Jumping, Sister Roots for her Brother*, SEATTLE TIMES (Feb. 19, 2010, 5:39 PM), http://seattletimes.nwsourc.com/html/olympics/2011132855_olyskijump20.html (describing Alissa Johnson's frustration, as she, the tenth-ranked ski jumper in the world, watched her brother jump at the 2010 Olympic Games).

¹⁶⁸ See Bryant, *supra* note 5 ("Even after Ms. Van won world championships last year, the US Ski Team – facing an 18 percent budget cut – dropped all funding for women's jumping, and men's, too.").

¹⁶⁹ *Sagen I*, 98 B.C.L.R. 4th 109 at para. 119.

women ski jumpers in lieu of funds they would otherwise have been entitled to receive but for the IOC decision.¹⁷⁰

The Government of Canada settled with the plaintiffs, agreeing to lobby for the inclusion of the women's event, though it made no public mention concerning damages.¹⁷¹

Notwithstanding any compensation decision, the Olympics is one of the world's most watched sporting events, and the media coverage that the Games generate inspires youth, both male and female, to try a particular sport they have seen, which ultimately leads to the growth of the sport.¹⁷² For example, the U.S. women's soccer team's Olympic gold medal in 1996 led to a surge of participation in women's soccer in the United States.¹⁷³ Therefore, even if a court was willing to award damages, and we have seen how unlikely this would be with the national court's deference to the IOC,¹⁷⁴ the main advantage of compensation would be to pay for the plaintiff's training and competition expenses for the next four years. Age and injuries, however, make it impossible to ensure that one would still be able to compete on an Olympic team four years later, and the Olympic opportunity is ultimately the reward the athletes seek. Thus, female athletes are unlikely to have the financial incentive to bring the suit forward if there is little hope for gain of financial resources or athletic opportunity for them personally. Accordingly, these women will be less likely to pursue litigation as redress for their exclusion in the future.

*F. Internal Review of the Administration of the
Olympic Games Will Be Necessary For the
Continued Strength of the Olympic Movement*

As evidenced in the comparison between *Martin* and *Sagen*, the power, influence, structure, and multinational nature of the IOC has left litigation an impossible route for athletes with disputes surrounding IOC policy, and Olympic organizing committees can do little to affect IOC decisions¹⁷⁵. Most Olympic disputes are left to arbitration in the CAS, which was established by the IOC, who also

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at para. 120.

¹⁷² See, e.g., Carr, *supra* note 8, at 154 (illustrating that gender equality is important to the Olympic Games because it is the "world's highest profile sporting event").

¹⁷³ See *id.*

¹⁷⁴ See *supra* Part II.A.

¹⁷⁵ See *supra* Part II.A–E.

remains its funding source.¹⁷⁶ Thus, the CAS is often an inappropriate forum for athletes who are not Olympians because the policies of the IOC have denied them the opportunity to compete in the Olympics.¹⁷⁷

Accordingly, problematic disconnects still arise between the policies of the IOC and the fundamental values of its Olympic Charter.¹⁷⁸ The implementation of the rule grandfathering Olympic male sports in the 1940s is persuasive evidence of one particular disparity.¹⁷⁹ The Olympic Charter specifically denounces sex discrimination, but the rule created to allow the continued existence of “traditional” sports in the Olympic Games has allowed historical sex discrimination to persist.¹⁸⁰ Consequently, negative publicity for the IOC has increased recently, particularly concerning its discriminatory attitude toward women ski jumpers.¹⁸¹

As the IOC structure and policies have made litigation an impossible route for many athletes, Olympic reform is necessary to attain justice for them. Numerous articles have emphasized the difficulty faced in accomplishing Olympic reform, and many have made suggestions for what Olympic reform should look like.¹⁸² Some commentators suggest that the IOC should delegate authority to an independent adjudicative body to resolve Olympic conflicts.¹⁸³ In reality, however, it is unlikely the IOC will voluntarily move to subject itself to more suits from athletes, and the accompanying negative publicity, or to a position where it will be subjected to the national laws of so many countries, all with very different laws, legal

¹⁷⁶ See *supra* note 35 and accompanying text.

¹⁷⁷ See Ettinger, *supra* note 34, at 118 (discussing how the structure of the CAS has the potential to deny athletes due process); see also Ansley, *supra* note 13, at 300 (stating that the athletes must participate in the IOC process before the CAS arbitration can be effective).

¹⁷⁸ See *supra* note 30 (discussing the gender inequalities that still exist in the Olympic Games).

¹⁷⁹ See *supra* Part I.B.1.

¹⁸⁰ See *id.*

¹⁸¹ Individuals and corporations who have been inspired by these women ski jumpers circulated petitions to be sent to the IOC and a few have made documentaries. See, e.g., Secret, *Let Her Jump: 2014*, FACEBOOK, https://www.facebook.com/secret?sk=app_10442206389 (last visited Mar. 8, 2011) (urging visitors to sign a petition in support of women’s ski jumping as an Olympic event) (on file with author); see also Anna Victoria Bloom, *Female Ski Jumpers Frozen Out of Olympics*, MSNBC, <http://www.msnbc.msn.com/id/21134540/vp/35320777#35320777> (last visited Mar. 8, 2011) (reporting on the accomplishments of the athletes, the position of the IOC on excluding women’s ski jumping, and the Canadian litigation surrounding the IOC decision).

¹⁸² See, e.g., Ansley, *supra* note 13, at 278 (suggesting the IOC create an independent body through a delegation of its powers to adjudicate Olympic controversies); Nelson, *supra* note 33, at 899 (suggesting all international sporting bodies delegate power to an independent body to resolve international, and particularly Olympic, sporting conflicts).

¹⁸³ See *id.*

systems, and perspectives on justice. Accordingly, the solution to this problem should be internal to the IOC structure.

Unlike the suggestion of an independent adjudicative board, through internal IOC reform the IOC will be able to avoid the delegation of power to another independent body. This is consistent with the Olympic Charter's mandate that the IOC holds final authority on all Olympic Movement issues.¹⁸⁴ This would keep conflicts and disagreements surrounding decisions out of public scrutiny, until they are properly resolved. This would also limit corruption that is inevitable when an organization holds limitless power without a system of review.¹⁸⁵ One possible solution would be to restructure the IOC Ethics Commission to oversee the IOC Executive Committee and compare all final decisions of the IOC against the fundamental principles of the Olympic Movement.

The IOC Ethics Commission was implemented in 1999 following the reports of corruption surrounding the Host City choice for the 2002 Olympic Games.¹⁸⁶ Since 2001, the Ethics Commission has been responsible for "the expulsion or resignation of five IOC members and the reprimand of several others."¹⁸⁷ Four of the nine members of the Commission may be members of the IOC in another capacity, however.¹⁸⁸ Members who act in another IOC capacity are charged with ensuring that all financial, commercial, and athletic aspects of the Games come together.¹⁸⁹ If members of the Ethics Commission were to relinquish their other IOC responsibilities, they could more effectively ensure that each of the IOC's decisions are in full accordance with the Olympic Charter and the fundamental values of the Olympic Movement.

Additionally, the Ethics Commission currently only makes conclusions and recommendations to the IOC Executive Board, which maintains supreme authority on all decisions.¹⁹⁰ Yet, if the Commission had a veto power to issue opinions and resubmit

¹⁸⁴ See *supra* note 107 (describing the far-reaching and ultimate authority of the IOC in Olympic decision making).

¹⁸⁵ Inquiries into the selections of host cities in the past have revealed widespread corruption within the IOC. For example, in selecting the location of the 2002 Winter Olympic Games, nearly 20 of the 110 IOC members had purportedly accepted bribes to vote for Salt Lake City, Utah. See Fordyce, *supra* note 11 (reporting on the Salt Lake City scandal and citing other examples of corruption in the selection of Olympic locations).

¹⁸⁶ CHAPPELET & KÜBLER-MABBOTT, *supra* note 56, at 17.

¹⁸⁷ *Id.*

¹⁸⁸ See *id.*

¹⁸⁹ See *The Organisation*, INT'L OLYMPIC COMM., <http://www.olympic.org/en/content/The-IOC/The-IOC-Institution1/> (last visited Mar. 8, 2011) (listing the roles of the IOC, derived from the Olympic Charter).

¹⁹⁰ See CHAPPELET AND KÜBLER-MABBOTT, *supra* note 56, at 17–18.

decisions back to the appropriate IOC organization for retooling when concerns were detected, ideally, this would improve the public perception of the Olympic Movement by literally placing ethics first. Furthermore, this structure would ensure the policies of the IOC are modernized as necessary and kept consistent with prevailing notions of fairness and justice, while still rooted in the Olympic values of “fair play, friendship, and education through sport.”¹⁹¹ Thus, if the Ethics Commission detected, for example, a sex discrimination issue in one of the specific decisions made by the IOC Executive Board, the Ethics Commission could require that the decision be reworked, and not made public until the Ethics Commission finds that the decision is consistent with the Olympic Charter and Movement. Ultimately, this would eliminate the possibility of the sex discrimination exhibited in *Martin* and *Sagen*. It would also protect Olympic athletes and hopefuls from the potential harms of unethical decisions made from within the Olympic Movement.

CONCLUSION

When people think back to the 2010 Olympic Games in Vancouver, British Columbia, many will remember a number of American athletes for their outstanding performances in their respective sports and events, such as Bode Miller, Lindsey Vonn, Shaun White, Evan Lysachek, Julia Mancuso, and Apollo Anton Ohno.¹⁹² Yet, for those invested in women’s ski jumping, such as Lindsey Van, the Games will be remembered with much sadness and frustration. For the fifteen ski jumpers that chose to sue VANOC to remedy their exclusion from the Vancouver Games, much was learned about the possibility, and impossibility, of litigation as a route to attain inclusion in the Olympics.¹⁹³ Yet, although litigation was not the answer for these women, public support from grassroots campaigns, like Secret’s “Let Her Jump,”¹⁹⁴ undoubtedly required the IOC to reconsider the purpose and values behind the Olympic Movement,¹⁹⁵ and ultimately pressured the IOC to make its April

¹⁹¹ Ansley, *supra* note 13, at 277.

¹⁹² See Vicki Michaelis, *USA Hauls in 37 Medals in a Winter to Remember*, USA TODAY (Mar. 1, 2010, 10:59 AM), http://www.usatoday.com/sports/olympics/vancouver/2010-02-28-usa-medals-record_N.htm (giving an overview of the US gold medal winners in the 2010 Winter Olympics).

¹⁹³ See *supra* Part II.A–E.

¹⁹⁴ See Secret, *supra* note 181 (encouraging site visitors to support the female ski jumpers by signing a petition urging the IOC to include women’s ski jumping in the 2014 Olympics).

¹⁹⁵ See, e.g., Katie Thomas, *Women Can Only Test the Hills*, N.Y. TIMES, Feb. 22, 2010, at D6 (explaining that women’s ski jumping will be an event at the 2012 Winter Youth Olympics in Innsbruck, Austria, and that IOC spokeswoman Emmanuelle Moreau said that the IOC may

2011 decision to include women's ski jumping in the 2014 Sochi Games.¹⁹⁶ The controversy over women ski jumping illustrates just one example of many in which the IOC has been able to limit justice and recourse for athletes because of its international power and authority.¹⁹⁷ Accordingly, the IOC must further consider internal reform to put ethics first, not only for the athletes with unresolved disputes, but also for the continued strength of the Olympic Movement.¹⁹⁸

JENNIFER ANN CLEARY[†]

vote to include women's ski jumping into the 2014 Olympics as early as 2011).

¹⁹⁶ See Coleman, *supra* note 9 (discussing the IOC's decision to add women's ski jumping and five other events to the 2014 Winter Olympic Games in Sochi, Russia).

¹⁹⁷ See *supra* Part II.A.

¹⁹⁸ See *supra* Part II.F.

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