One of the greatest absurdities in the football mythology is that the players’ interests are identical with those of coaches and administrators.

DAVE MEGGYESY, *Out of Their League*, p. 78
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Playing at Hand-Sworn, Bucklers, Football, Wrestling, and the like, whereby one of them receiveth a hurt, and dieth thereof within a year and a day; in these cases, some are of the opinion, that this is a Felony of Death: some others are of opinion, that this is no Felony of Death, but that they shall have their pardon, of course, as for misadventure, for that such their play was by consent, and again, there was no former intent to do hurt, or any former malice, but done only for disport, and traill of Man-hood.

MICHAEL DALTON, seventeenth-century legal scholar

The issue of discerning consent is central to many court cases in Canada (Jones, 2000). The accused will often argue that the complainant gave consent, a legal defence most commonly used in cases involving sexual assault (Cowling & Reynolds, 2004; Stewart & Norris, 2004;
Consent is, however, an integral aspect of many other cases. In this book I explore how participants (players, coaches, and officials) in Canadian football perceive consent by looking at three relevant areas: violence, hazing, and performance-enhancing drug use.

To examine this issue, the book delves into the complicated relationship athletes have with their sport and the law. It explores how players perceive and understand consent in stadiums filled with fans yelling “rip their heads off,” in locker rooms when veteran players demand rookies undress to receive anal prodding from “Mr. Broomstick,” and on team buses where performance-enhancing drugs are passed around like “penny candy.” Most importantly, it explores how acts that are considered criminal outside of the context of sport are tolerated, and in many ways promoted, in Canadian football. In the process, I identify the real “game-day gangsters”— they are not just the athletes engaged in quasi-criminal acts but also include those team and league administrators who tolerate, support, and promote them. I conclude the book with a discussion of what can be done to remedy the social problems that are now prevalent in Canadian football.

In the course of conducting research for this book, I interviewed eighty-one football players and administrators; their statements reveal the complex and multifaceted understandings those inside Canadian football have about consent as it relates to potential criminal acts. I hope the findings and theorizations offered here will be further explored and developed in subsequent research.
Violence, hazing, and drug use are all commonplace in Canadian football. They each raise similar yet unique legal concerns in relation to consent. I open the book with a discussion of the issues faced by lawyers and judges attempting to determine what constitutes consent and how to prove it has been given in Canadian sport. The next three chapters explore players’ complicated and contradictory perceptions of consent in relation to violence, hazing, and performance-enhancing drug use in Canadian football specifically. These discussions reveal the disjuncture between how the legal system defines players’ conceptions of consent and how players actually define consent in their own lives. In subsequent chapters I examine the concepts of “arenas of toleration” and “constrained consent” to show that legal rulings are not being made in the interest of players, and that free and informed consent is not possible within the current context of Canadian football. I conclude with a discussion about the implications of this research and the possible alternative models for dealing with legal issues in sport.

**DEFINING AND DISCERNING CONSENT**

While the Canadian Criminal Code makes no direct reference to consent as it relates to sport in Canada, the term is widely used within the code to describe various other infractions. Two sections of the code deal with the legal concept of consent in the most detail: Sections 150–154, pertaining to sexual offences, and Sections 265–268, pertaining to various forms of physical assault.
Section 151.1(2/3) of the code defines consent as “the voluntary agreement of the complainant to engage in the [activity] in question.” This section lists five scenarios in which voluntary consent has not been gained:

(a) the agreement is expressed by the words or conduct of a person other than the complainant;
(b) the complainant is incapable of consenting to the activity;
(c) the accused counsels or incites the complainant to engage in the activity by abusing a position of trust, power, or authority;
(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
(e) the complainant, having consented to engage in the [activity], expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

Thus as Canadian law defines it, voluntary consent requires that the individual has a capable mental state, is free of coercion, and has the right to refuse. In addition, consenting to an initial activity does not necessarily imply consent to all subsequent activities. Section 153.1(5) of the Criminal Code adds to this definition by suggesting the accused must perceive that the act was not consensual. However, if the accused developed this perception in a reckless state of mind, or did not take reasonable steps to ascertain the complainant’s consent, then this perceived consent is void.

Criminal cases involving violence in Canadian sport tend to be tried under the physical assault laws in the Criminal Code (White, 1986). While this section contains
less detail on what voluntary consent entails, the term is repeated several times. Section 265(1) defines common assault as an application of force to another person without his or her consent. The conditions that prevent an individual from giving consent, regardless of his or her compliance, exist when the accused uses:

(a) the application of force to the complainant or to a person other than the complainant;
(b) threats or fear of the application of force to the complainant or to a person other than the complainant;
(c) fraud; or
(d) the exercise of authority.

Like the sexual assault provisions, there is also a common assault provision in Section 265(4): for a crime to have occurred, the accused must perceive that the activity is non-consensual. If the accused believes that the complainant consented, then this would constitute what is commonly referred to as “the consent defence” (Binder 1975, p. 235).

A further provision in the Canadian Criminal Code suggests that the consent defence is not universal, as not all activities are legal just because they are consented to. This is clear in Section 14, “Consent to Death,” which states that “no person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given.” While this may appear to have little to do with violence in sport, it reveals that the consent defence is not universally accepted. Yet it has been taken as a valid argument in the realm of sports-related law.
Thus according to the Canadian Criminal Code, consent is defined as a voluntary agreement to participate in an activity that is free of coercion, deception, or fraud, and is granted and accepted in a clear mental state by all individuals involved. Additionally, consent is only a limited guarantee of defence because Canadian law does not allow individuals to consent to activities that are believed to cause undue harm, such as assisted suicide.

Despite the prevalence of violence, hazing, and drug use in Canadian football, few cases have appeared before the courts to deal with these infractions. The following section considers the issue of defining consent in Canadian sport. By doing so, it will more clearly depict the various difficulties Canadian lawyers and judges face in discerning consent within the context of sport. Where relevant, I also discuss other legal cases not involving sport.

**VIOLENCE**

As Dalton’s statement at the start of this chapter indicates, the issue of discerning consent in violent sport is a centuries-old one. Despite this fact, various legal questions remain. The issues that prosecutors face when attempting to gain successful convictions in cases of sport violence are an unclear Criminal Code; the voluntary nature of sport participation; deciding where to draw the line (that is, defining the limits of acceptable behaviour); the occurrence of non-specific contact; determining the intent of the accused; establishing liability; and finally, weighing the benefits and risks of sport.
There are no Criminal Code provisions that mention consent in sport. Thus the task of lawyers and judges in cases involving violence in sport is to interpret the code and any legal precedents entrenched from interpretations by other legal professionals. Each case, however, has its own unique set of circumstances. For example, in *R. v. McSorley* (2000), professional hockey player Marty McSorley violently struck the head of an opposing player, Donald Brashear with his stick; the two players had engaged in a consensual fight earlier in the game. McSorley was both charged with and convicted of assault with a deadly weapon. Four years later another NHL player named Todd Bertuzzi appeared in a Canadian court after a violent incident with more permanent consequences (*R. v. Bertuzzi*, 2004). Bertuzzi had struck player Steve Moore in the back of the head with his gloved fist, breaking two of Moore’s vertebrae and inflicting a brain injury that subsequently ended the man’s hockey career. In this case, Bertuzzi was given a conditional discharge on the grounds that he would provide eighty hours of community service.

In both cases, the Criminal Code offered little clarification on how to deal with the issue of violence within the game. While some precedents involving violence in professional sport did exist, they had different aggravating and mitigating factors. For example, in *R. v. Maki* (1970) and *R. v. Green* (1971), two professional hockey players, Wayne Maki and Ted Green, appeared in court after engaging in an altercation where both used their hockey sticks as weapons, inflicting horrific, near-fatal injuries upon each other. Despite their significant injuries, neither of the men in this incident were convicted of a criminal offence. And while both of these cases set precedents, they cannot be
easily equated to the McSorley case. McSorley used his stick against a player who did not fight back. Likewise, the factors involved in *R. v. Bertuzzi* (2004) were clearly different, as no sticks were involved, and only one person was injured.

A second major difficulty the Crown faces when prosecuting cases of assault in sport is that it is perceived as a voluntary activity; it is commonly assumed that players understand the risks of the game and thus, by stepping on the field, they have consented to taking these risks. The Canadian Criminal Code suggests that consent must be voluntary and free of coercion, deception, or fraud. The alleged voluntary nature of participation in sport lends credibility to the consent defence, and is tied to the notion of *volenti non fit injuria* (translated as “injury is not done to the willing person”), or the legal assumption of risk (Corbett, Findlay, & Lech, 2008, p. 28).

Looking at the rulings of the judges in *R. v. Green* (1971) and *R. v. Maki* (1970), the value that Canadian courts place on the voluntary assumption of risk in sport is clear. In *R. v. Green* (1971), the judge stated,

I think within our experience we can come to the conclusion that this is an extremely ordinary happening in a hockey game, and the players really think nothing of it. If you go behind the net of a defenceman, particularly one who is trying to defend his zone, and you are struck in the face by that player’s glove, a penalty might be called against him, but you do not really think anything of it; it is one of the types of risk one assumes.
Similarly, the judge in *R. v. Maki* (1970) said that “all players, when they step out onto a playing field or ice surface, assume certain risks or hazards of the sport.” In both cases the judges held neither player criminally responsible, and they were not legally penalized.

These interpretations of the law raise a question about how voluntary sport participation actually is. After all, a professional football player cannot easily leave the field of play if he feels the game has become too violent. Doing so would result in a fine or suspension from his team, possibly a fine from the league, the jeering of fans, being held in disrepute by his teammates, and the potential loss of his livelihood. Likewise, in university sports, if a football player were to refuse to play or left the field he would be placing himself at risk of losing his scholarship, which might be his only means of securing a university education. Determining the degree to which an individual’s participation is voluntary is not as easy as first described, given the possibility that the participant may have been coerced by a number of factors. This is important because coercion, under the Canadian Criminal Code, is grounds for voiding the defence of consent.

Building on the issue of voluntary participation is the question of where to draw the line in relation to consent and/or legality. That is, what is the acceptable range of rule-violating behaviours that players voluntarily consent to in sport? Some legal scholars, such as Alexandru Virgil Voicu (2005), suggest any behaviour that extends beyond the rules of the game is open to making a player liable for a criminal and/or civil offence. However, as many have contended, the rules of a given sport are never clear (Michigan Law Review Association, 1976). Formal
rules for particular sports are accompanied by a set of informal rules that govern with similar authority.

Players break formal rules in sport routinely. Given this, his or her consent to play is often also considered as consent to the risk of violent and often injurious actions, even if they fall outside of the rules of the game. For example, in *R. v. Green* (1971), the judge stated that a player being punched in the face, while outside the formal rules of the game, was an “ordinary happening in a hockey game and the players really think nothing of it.” The question then becomes where to draw the line of consent and/or legality. There is no clear formula for how to determine this line, and it is likely very different depending on the norms of the given sport.

In *Dunn v. University of Ottawa* (1995), a civil case brought by a player who sustained a serious injury when he was illegally tackled in a football game, the judge clearly suggested that simply because a play exists outside the rules of the game does not mean that it negates implied consent. He stated:

Football is a game sometimes described as controlled violence. There is much beauty and artistry within the context of this game, but there is also much vigorous and rough bodily contact by oftentimes large, fit men, wearing extensive protective gear. By playing this game, those involved accept certain risks, and of course one of those risks is that an injury will occur, given the nature of the game. Clearly, each case must be decided on its own facts, however, there can be little doubt that injuries inflicted in circumstances which show a clear resolve to cause injury do not
fall within the scope of implied consent. Therefore, the significant issue in this case is whether or not Lussier’s conduct fell within or outside the scope of implied consent. Where contact is legal, within the rules of the game, no liability can attach. Even if contact is made outside the rules of the game, there can be no liability unless the player can establish that the Defendant knew he was breaking the rules, and had formed a deliberate resolve to injure or that he was reckless as to the consequences of his actions.

This important precedent suggests that the line defining acceptable behaviour cannot be drawn based on the rules of the game, but rather depends on the intent of the accused.

The problem of where to draw the line is further complicated in cases where the injurious act in question arises from non-specific contact. In the case of *R. v. McSorley* (2000), the violation was clear: McSorley skated across the ice with his stick in the air before striking the head of Brashear. However, not all acts are this obvious. For example, in his autobiography, a professional football player named Bill Romanowski (2005) gives an account of a potentially criminal violent act that occurred in a pile of football players:

> When I was at the bottom of the pile . . . I reached to rip the ball out of the hand of Giants’ running back Dave Meggett, all I could get a good grip on was his finger. So I just grabbed it and *crrraaaccckkk*. Broke it like a chicken bone. I could hear him scream in agony. Oblivious, I got up and headed back to our
huddle as if nothing happened. My thinking was, *Dave Meggett’s finger is broken... Good. Better for our team. Helps our chances of winning — which we did, 44-3.* (Romanowski, 2005, p. 110, italics original)

How could a referee have caught this act? How could Meggett prove that it did not occur because of a routine tackle that he consented to?

Action in sport happens quickly, and despite the modern technology designed to record its intricacies, it is not always possible to know if a violent act was part of routine play or deliberately designed to injure. When Jason Jimenez broke Anthony Gargiulo’s leg in a tackle in a Canadian Football League game, an injury that subsequently ended Gargiulo’s career, no charges were brought against Jimenez because there was no replay footage to show what had occurred (CanWest News, 2007). It was not entirely clear if the contact was within the rules of the game or not.

Tied to this difficulty is the legal notion of *mens rea* (Latin for “guilty mind”), or the knowledge and intention to commit a prohibited act (Epstein, 2002). This is a major issue in sport litigation for four reasons: non-specific contact makes it difficult to discern if the player had any malicious intention; violent acts in sports might be perceived as instinctual; an objective of many sports is to physically harm, and even injure, opponents; and the accused player may believe that the complainant was a consensual participant in the violent act (Michigan Law Review Association, 1976).

The fact that players often act instinctually presents an additional legal difficulty in determining intent. *Mens*
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rea suggests that the accused thought about their act prior to committing it (Epstein, 2002). Actions in sport are, however, often reactions to a rapidly changing situation, making it difficult for a judge to discern whether or not a player had the time to clearly think about committing a wrongful act. Furthermore, in the course of play, a player’s excited emotional state could be considered a negative influence on his ability to determine right from wrong.

A third difficulty of discerning consent in relation to violence is that the deliberate harming of others is often an objective of a given sport. One of the most obvious examples is boxing where, as Jack Anderson (2007) suggests, the purpose is to assault one’s opponent. Similarly, in sports like football and hockey where body contact is prevalent, an expected part of the game is that players will try to knock one another down. The intent to injure appears to exist; however, players are able to navigate around the law if they can prove they thought the act was consensual.

The fourth difficulty in determining consent is that the accused must have knowingly injured the plaintiff without his or her consent. The R.v. Pappajohn (1980) sexual assault case introduced the “honest but mistaken belief” clause to Canadian legal precedent. In this case, the defendant, George Pappajohn, argued for the right to use a mistake of fact defence, as he believed that the complainant consented to have sexual intercourse with him. The court decided that “reasonable” mistaken belief in consent should be considered. Pappajohn failed to prove that he reasonably believed that the complainant consented to have sexual intercourse with him, but the precedent was established nonetheless. This provision can be used in
cases of violence in Canadian sport, as a perpetrator of on-field violence can argue that he mistakenly believed that the other athlete had consented to the act. So where do players draw the line defining the extent of violence they consent to? And are players in the heat of competition able to make knowledgeable decisions about whether their opponent is consenting to the act of violence?

Beyond determining culpability is the issue of determining liability. Liability defines who is at fault and to what extent (Hronek & Spengler, 2002). Thus far, this chapter has only considered the criminal liability of a player who has committed a violent and injurious act. There are, however, other possible sanctions, such as civil liability or financial redress, as well as the liability of other individuals (Hronek & Spengler, 2002). Below I will briefly explore who else might be liable when injurious violence happens in sports, and what issues this poses in sports litigation.

Non-players can and have been held liable for sport injuries. For example, in two British cases (Smolden v. Whitworth, 1997; Vowles v. Evans, 2003) the referees of two separate rugby matches were held civilly liable for the serious injuries that two players sustained as a result of them breaching their “duty of care” to keep control over the game (Caddell, 2004). In a Canadian case (Thomas v. Hamilton City Board of Education, 1994), a high school football player sought damages from his school board because his neck was broken during play that he believed resulted from improper coaching. Similarly, in Dunn v. University of Ottawa (1995), a football player seriously injured during a game successfully sought damages from the coach of the opposing team for failing to adequately control
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his players and coaching staff. In this case, liability was transferred to the University of Ottawa, where the coach was employed. In a case involving the CFL, *Bell v. Edmonton Eskimos Football Club* (1988), a player named James Anthony Bell sought damages against his team for serious injuries that he believed resulted from the improper manufacture of his helmet and the club’s lack of investigation into the potential dangers of the product they supplied.

These cases all ask the same question: who is at fault? The difficulties of determining this are similar when dealing with any organization where it is challenging to pinpoint who has final responsibility (Hagan & Linden, 2009). Once liability is determined, demonstrating the culpable intent of the various accused is also difficult, as is deciding the degree to which the players consented to the acts of the accused. In the rugby cases just discussed, the judges decided that the players did not consent to the referees’ breach of their duty of care. Other possible incidents, such as a football coach tapping one player on the shoulder and telling him to “take care of” an opponent, are not so clear.

In the Canadian Criminal Code, proving consent was granted is not always sufficient for protection from criminal prosecution. For example, an individual’s consent to using cocaine does not make the practice legal. This particular type of legal provision is intended to protect people from consenting to activities with a high risk of causing harm. Why, then, is there such concern with the question of consent in sport? If sport has such a high risk for causing injury, why is the consent defence considered?

Consent is a legal issue in sport because unlike cocaine use, the benefits offered to individuals and society by the institution of sport are more readily apparent.
Sports have clear health benefits to both individuals and society, since they,

help maintain the citizenry’s physical fitness, provide an outlet for frustrations and aggressive tendencies, satisfy the need and desire for people to prove their self-worth, provide for recreation and the pleasurable use of leisure time, and, at least with regard to team sports, train individuals to sacrifice themselves for the good of the group. (Michigan Law Review Association, 1976, p. 174)

Given these and other perceived individual and social benefits, consent is an important issue in sport litigation in ways that it is not for cases involving assisted suicide or illegal drug use. These positive aspects of sport undoubtedly also contribute to the reluctance of sports officials and legal administrators to bring to court cases on matters of sport violence. For example, if referees were always held liable for incidents that take place during a game, individuals would no longer want to volunteer their time and services, and local sport communities could collapse as a result. Furthermore, as I will argue in later chapters, sports generate tremendous revenue, so criminalizing it would hurt capitalist interests.

HAZING

The issues of discerning consent in relation to hazing (also termed initiation) in Canadian sport are similar to yet distinct from the issues I previously discussed pertaining to violence. The main legal issues in prosecuting
cases involving hazing are an unclear criminal code; where the line defining acceptable behaviour is drawn; the voluntary nature of participation; determining liability; and the secrecy surrounding the act. While incidents of violence in sport have led to few legal cases in Canada, even fewer have involved hazing. However, these cases, as well as the discussions of legal scholars in other countries where the prosecution of crimes relating to hazing is more common, have involved many of the issues presented here.

As with violence, no distinct legal statutes exist in Canadian law that detail what entails consent in relation to hazing in sport or in more general hazing activities. Hazing is, of course, not restricted to sport; it is common practice in the military, high schools, fraternities, and workplaces (Davis, 1997; Guynn & Aquila, 2004; Nuwer, 2000, 2001, 2004; Sweet, 1999). In the United States, at least forty-three states have laws or statutes pertaining to hazing (Finley & Finley, 2006). Of these, many recognize the consent defence as a legal strategy that reduces or eliminates criminal responsibility (Rosner & Crow, 2003). In Canada, no such legislation exists at the federal or provincial levels. Instead, lawyers and judges are left to interpret Criminal Code and Common Law in cases involving hazing.

In one case of hazing in the Canadian Armed Forces, an individual filed a grievance for acts classified as sexual assault, assault and battery, breach of fiduciary duty, negligence, and breach of Section 7 of the Canadian Charter of Rights and Freedoms (Brownhall v. Canada, 2007). Although the act that took place was termed hazing, the incidents were handled as individual crimes.
In a hazing case involving a junior hockey team in Canada, the acts were also handled individually, resulting in charges of performing an indecent act (Robinson, 1998). In this case two men, a player and a team trainer, were charged after subjecting team rookies to a series of hazing rituals. In Crossing the Line, Laura Robinson describes one of the sexual acts involved in this hazing ritual:

Scott did what he was told. These were men who could make or break his hockey career. They tied a string to his penis, [attached a pail to the other end], and then suspended the pail over the hockey stick. Out came the pucks. They started to throw them into the pail. As the weight increased, it pulled heavily on the string. It hurt, but Scott endured until the string pulled off. (Robinson, 1998, p. 67)

Many of the team’s players, coaches, and administrators were involved in the hazing rituals, and yet only two were charged. Further, the charges made against these individuals were not of a serious nature. The prosecuting lawyer in the case stated that pursuing the more serious charge of sexual assault would have been too difficult (Robinson, 1998). To do so he would have been required to show that the players had not consented to be part of this ritual.

Prosecution on lesser charges is commonplace in cases of hazing that appear in Canadian courts. In R. v. L.P. (1998), one training officer at an Air Cadet training centre required several young men and women, between the ages of fourteen and seventeen, to engage in a number of sexual acts during a game of truth or dare. The dares included such things as streaking around the camp naked.
and simulating anal sex. The accused pled guilty to two counts of sexual exploitation and was sentenced to five months in prison. He later appealed and had his sentence reduced. Reflecting on the defence’s request for a lesser sentence, the President of the Standing Court Martial outlined the serious nature of the offence:

In my view, a sentence of thirty days incarceration is unreasonable and inadequate in the circumstances. We have six offences involving several young victims wherein the offender, a commissioned officer in charge of cadets undergoing adventure training, committed two sexual exploitation offences, counselled cadets to perform other degrading acts involving partial nudity and simulated sexual activity, and harassed cadets into performing other embarrassing acts. (R. v. L.P., 1998)

The sentence that the training officer did receive was notably longer than what a regular civilian would be required to serve, according to the presiding judge, as the officer was engaged in providing a public service to minors at the time of the offence. Citing that the offences were part of an initiation process might in fact be seen as a legitimate defence against more serious charges in the Canadian legal system. In the absence of legislation pertaining specifically to hazing, it becomes the task of lawyers and judges to find another charge that can stick.

As with violence on the field, another difficulty in prosecuting crimes associated with hazing is determining where to draw the line of consent. Elizabeth Allan and Brian Rahill’s anti-hazing website (http://www.stophazing.org) identifies a continuum of hazing acts. At one end
of the spectrum is “subtle hazing,” which involves such things as being required to carry heavy team equipment, clean up practice facilities, sing in front of groups of people, or receive unwanted nicknames. In the middle is “harassment hazing,” involving more potentially embarrassing or painful acts like being pressured to dress in clothing of the opposite gender, the unwanted removal of body hair, or being required to perform pointless tasks for senior group members. And at the other extreme is “violent hazing,” which includes forms of sexual abuse, physical beatings, forced alcohol consumption, abduction, and exposure to harsh weather conditions without proper clothing.

In this regard, the difficulty of discerning consent lies in identifying the extent to which consent was given, if it was granted at all. To provide an example, a football player may give his full consent to consume copious amounts of alcohol, by force if necessary, at a team gathering. He might not, however, consent to be dropped off blocks away from his home in only a T-shirt in the middle of winter while grossly intoxicated. Likewise, certain acts are more physically, emotionally, and psychologically harmful to some individuals than others. For example, one player might find it humorous and enjoyable to dress up as a woman for a night out with the team, while another might find it offensive, demeaning, and humiliating.

While the above mentioned continuum of hazing (http://www.stophazing.org) reveals the broad range of activities that fall under the label of hazing, and the accompanying harm that can result from such acts, it fails to accommodate personal perceptions of these incidents. The difficulty then lies not only in determining whether
the complainant consented to participate in specific hazing rituals but also whether the accused believed that the complainant had given his or her consent; that is, the “honest but mistaken belief” defence. The variability in individual perception of the line between acceptable and unacceptable hazing makes it difficult to determine whether the accused perceived the act as consensual or not. In the absence of laws and legislation on hazing, no clear legal definitions exist to identify what is perceived as acceptable forms of hazing and what is unacceptable. Likewise, there are no criteria for what is and is not considered a reasonable belief that the complainant consented to the act.

Like violence and aggression on the field, hazing is often perceived as a part of male sports that nearly all players experience voluntarily (Woods, 2007). The legal argument could be made that by agreeing to participate in football, one is agreeing to be hazed. Some believe that athletes consent to participate in whatever hazing rituals a team sees fit. However, simply because an individual knows that he or she is participating in a potentially harmful situation does not mean that he or she has consented to any outcome that might result.

Hazing often involves large numbers of individuals. In the incident Robinson described, where the junior hockey player had a bucket of hockey pucks strapped to his penis, an entire hockey team — including team administrators — were allegedly involved. Who, then, should be held responsible? Should only the individuals who added the pucks to the bucket face legal penalty, or should the onlookers as well? Likewise, if a coach is informed of these activities and does nothing to stop them, or does
not penalize those involved if he finds out after the fact, is he in some way legally responsible?

Unlike violence on the playing field, which is seen by officials, administrators, other players, and spectators, hazing often occurs behind closed doors (Kirby & Wintrup, 2002). As a result, crimes associated with hazing are difficult to prosecute. Before consent can be determined, it must be established that an illegal act did in fact take place. In most incidences of hazing, this becomes a question of the complainant’s word versus that of his or her team and coaches. Furthermore, players will typically avoid going against their team to report any wrongdoings. Part of the perceived merit of hazing is that it binds teammates together through a shared experience, and often a secret. Describing this process, Laura Robinson (1998) writes,

> when players are induced to break sexual taboos, they have crossed a line together and shed inhibitions that would otherwise place limits on what they are willing to do for the sake of the team. In this way they become part of a well-oiled machine without friction of each other’s conscience. (Robinson, 1998, p. 92)

In many cases, hazing rituals become a team’s shared secret. If a player reports an incident, he not only faces the ridicule of his teammates and exclusion from the group but also the possibility of the team collectively denying that the hazing even occurred (Robinson, 1998). Discerning consent, then, becomes secondary to determining if and what potential crimes associated with hazing actually occurred.
PERFORMANCE-ENHANCING DRUGS

Litigation surrounding the use of performance-enhancing drugs raises different challenges than those of violence and hazing. Where few laws and precedents exist in Canada pertaining to sport-related violence and hazing, the laws are clearer in regard to performance-enhancing drugs. The Controlled Drugs and Substances Act (CDSA) regulates the importation, production, and distribution of illegal drugs in Canada and prohibits the sale, production, and possession of a wide variety of controlled substances.

Many controlled substances can be classified as performance-enhancing drugs, used by athletes to gain a competitive edge in terms of muscle recovery, accelerated injury recovery, stamina enhancement, strength increase, and energy stimulus. Many of the drugs considered performance-enhancers can be legally provided by a medical doctor with a prescription, but the use, possession, and distribution of these drugs without a medical prescription is often illegal. The CDSA recognizes only one category of performance enhancers under the heading of “anabolic steroids.” While not considered by the CDSA to be performance enhancers, many athletes also use other unlawful drugs for performance-enhancing purposes, such as various stimulants like meta-amphetamines (often referred to as speed), and painkillers like codeine (Bahrke & Yesalis, 2002).

It is not illegal in Canada to possess and use steroids without a prescription, provided that the individual does not possess an amount of the drug that suggests the
possibility of trafficking. Anabolic steroids are regulated under Schedule IV of the Controlled Drugs and Substances Act; it is a criminal offence to seek or obtain them, and to traffic, import, export, or produce them. Persons found guilty of obtaining or seeking to obtain anabolic steroids face a sentence of imprisonment for a term not exceeding eighteen months. Or if an individual is convicted of seeking unlawful authorization from a medical practitioner to obtain steroids, he or she is liable,

(i) for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both, and

(ii) for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year, or to both. (CDSA 4(7) (b))

In cases of importing, exporting, producing, and trafficking Schedule IV drugs, offences are punishable by summary conviction involving imprisonment for up to one year, or on indictment by imprisonment for up to three years (CDSA 5(3) (c)). For other drugs, such as codeine, similar laws apply. If attempts are made to unlawfully obtain a prescription drug for the purposes of personal use or trafficking, a fine or summary conviction could result.

In practice, those caught obtaining and distributing illegal steroids in Canada have not faced harsh penalties. In *R. v. Murray* (1998), the defendant was required to pay a fine of $4,000 (CAD) which reflected the street value of the steroids he had imported. In *Fetherston v. College of Veterinarians of Ontario* (1999), Robert Fetherston received a two-year suspension from practising veterinary medicine in Ontario for illegally distributing steroids with the
knowledge that they were meant for human consumption. In *R. v. Paul* (1997), the defendant received a penalty of 200 hours of community service for steroid distribution. The judge noted during this case that,

> the substance in question here is steroids, which is a controlled drug. That, in my view, is a very different substance from heroin or cocaine, or other prohibited drugs where, for first offenders involved in trafficking, a custodial sentence is the norm.

In none of these cases did the defendant receive any prison time. While treated in the legal system with less severity than in-game violence and hazing, performance-enhancing drug use is often perceived as a more serious offence in the regulatory frameworks of many sports leagues and organizations, and can result in penalties ranging from fines to lifetime suspensions from participation (O’Leary, 2001).

Unlike discerning consent in relation to violence and hazing, which is crucial because the consent defence denies that a criminal offence took place, legal cases involving performance-enhancing drugs generally do not focus on consent. Issues of consent do, however, still factor into such cases. Consent in cases of performance-enhancing drug use can be seen as an admission of guilt rather than an exoneration or legal defence. Two main issues arise when discerning consent in cases involving performance-enhancing drugs: determining the intent to obtain, use, and/or traffic the drugs, and determining liability.

There are no laws in Canada that ban the use of steroids if an individual obtains them by lawful means or without the knowledge that they were procured illegally.
Athletes can claim that they have used an illegal anabolic steroid without their knowledge or consent. This allows the accused to employ three legal defences to navigate around the law by making it difficult to determine his or her intent to obtain, use, and/or traffic illegal performance-enhancing drugs. In each, the defence denies that consent was given to use or possess illegal steroids.

One defence the accused can use to refute intent is to shift the blame onto another person. An athlete might suggest that he was unaware he was even using illegal steroids, as his trainer supplies him with a series of performance-enhancing supplements. In this case, the athlete claims that the trainer has violated his trust by not gaining his consent before supplying illegal drugs. Ben Johnson, a Canadian sprinter, made this claim when he suggested that someone must have slipped anabolic steroids into his drink without his knowledge. He claimed that “his body may be guilty, but his mind is innocent” (Johnson & Moore, 1988, p. 3).

Individuals caught using, possessing, and or trafficking illegal steroids may also make the claim they were unaware that a particular supplement they purchased legally contained any illegal ingredients. For example, in a Canadian civil suit, a number of individuals sought damages from a major supplement supplier by the name of Muscletech in 2006, since the company failed to accurately disclose that some of their products contained anabolic steroids.

Another intent defence that athletes have used is denying knowledge of the contents of packages filled with steroids received from international locations. In most fitness and bodybuilding magazines, the back pages are
filled with advertisements for anabolic steroids that can be shipped to Canada, without a prescription, from other countries where they are readily available. There are also countless websites that offer similar purchasing opportunities. Ordering anabolic steroids from these sources is illegal in Canada for two reasons. First, it is considered a conscious attempt to obtain steroids. Second, the quantities that are shipped are generally large enough to warrant a charge of trafficking. However, if the shipment is stopped and screened at customs upon entering the Canadian mail system, individuals can deny knowledge of the contents of the box.

In *R. v. Schwengers* (2005), the accused successfully used this defence, as the prosecution was not able to successfully prove that he had intended to receive the box and had knowledge of its contents. Even in cases where there is evidence of a purchase, the defendant could use a similar defence, whereby he or she claims to have received a product different from that which was advertised.

All of these intent defences lead to the difficult task of determining liability. With the first defence, it is difficult to pinpoint who is in fact responsible for the steroids that appeared in the athlete’s locker or were injected into his or her body. There is no crime simply in possessing small quantities of anabolic steroids or testing positive for their use. The burden of proof lies in revealing how they were obtained and distributed. The difficulty, then, is uncovering the chain of distribution. Having illegal steroids flowing through one’s body is not enough to result in a criminal conviction in Canada. For the second defence, it is difficult to hold a large corporation criminally responsible. Corporations have traditionally eluded criminal
penalty because it is challenging to attach a culpable mental state to such an entity, and hard to determine the specific individuals involved (Hagan & Linden, 2009). The third defence contributes to the difficulties prosecutors have in revealing how the steroids were obtained and distributed because the shipments cross international borders, as evidenced in *R. v. Schewengers* (2005). In such cases, legal attention focuses on those at the end of the distribution chain rather than individuals at the higher levels.

**SUMMARY**

Litigation related to on-field violence, hazing, and performance-enhancing drug use in organized sport all hinge on the legal notion of consent. This chapter has outlined some of the important challenges when determining consent in the context of these acts. In the next three chapters, I will explore the lived experiences and perspectives of players and administrators involved in Canadian football at the junior, university, and professional levels. In the process, I hope to address a series of central questions:

- How do players and administrators perceive consent?
- Where, if possible, can we draw a line between what is and is not considered consent?
- Who should be held liable under certain circumstances?
• What circumstances render the issue of consent irrelevant?

• Do any clear differences exist between the lived experiences of players and the disciplinary handling and procedures of football administrators?

• Do any clear differences exist between the perceptions and experiences of players across different playing levels?

• How well does the Canadian legal discourse on consent fit with the lived experiences and perspectives of those involved in Canadian football?

• How should sport be governed?